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WHEREFORE, it is prayed that the deficiency determined by the respondent be in all respects approved.

/s/ Crane C. Hauser
Chief Counsel
Internal Revenue Service

OF COUNSEL:

HENRY C. STOCKELL, JR.
Regional Counsel

PAUL J. WEISS, JR.
Assistant Regional Counsel
Internal Revenue Service
Post Office Box 838
Greensboro, North Carolina

[fol. 14]

BEFORE THE TAX COURT OF THE UNITED STATES

WASHINGTON

September 20, 1962

149
Docket No. 2131-62

HOWE A. STIDGER, ET UX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

NOTICE OF FILING OF MOTION AND CALENDARING THEREOF FOR HEARING AS INDICATED—served September 21, 1962

You are hereby notified that the petitioner on September 17, 1962 filed a motion in the above-entitled case,

Supreme Court of the United States

OCTOBER TERM, 1966

No. 173

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

vs.

HOWE A. STIDGER, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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a copy of which motion is enclosed herewith, to change place of trial.

If you file an original and four conformed copies of a notice of objection thereto on or before October 10, 1962 specifically requesting hearing thereon, a copy of which will forthwith be served upon the opposite party, that motion will be calendared for hearing at Washington, D. C., in Courtroom No. 2, Constitution Avenue at 12th Street, N. W., at 10:00 A.M., on October 24, 1962, in which event this notice constitutes also a notice of hearing on that date.

If such notice and request is not received from you by the date specified for its filing, the Court will act upon the motion in its own discretion without hearing.

Your attention is called to the provisions of Rule 27 (a) (2) with regard to personal appearance at hearings on motions.

By direction of the Court.

/s/ Howard P. Locke
Clerk of the Court

To:

Howe A. and Betty M. Stidger
2137 Yorkshire Road
Sacramento 15, Calif.

Form 43-B
Nov. 1960

[fol. A]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 2131-62

Class

DOCKET ENTRIES

HOWE A. STIDGER AND BETTY M. STIDGER, 2137 Yorkshire Road, Sacramento 15, Calif., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES FOR PETITIONER:

NAME

ADDRESS

Date Month Day Year	Filings and Proceedings
June 18, 1962	PETITION FILED: FEE PAID June 18, 1962. Served June 14, 1962.
July 31, 1962	PETR'S CHANGE OF ADDRESS filed. Served Aug. 1, 1962.
July 31, 1962	ANSWER filed by resp. Served Aug. 1, 1962.
July 31, 1962	REQUEST by resp. for trial at Greensboro, N. C. Action GRANTED Aug. 1, 1962; Served Aug. 1, 1962.
Sept. 17, 1962	NOTICE of change of address filed by petr. Served Sept. 19, 1962.
Sept. 17, 1962	MOTION by petr. to change place of trial to San Francisco, California. Action GRANTED (Without Objection) October 1, 1962; Served Oct. 3, 1962.
Sept. 20, 1962	NOTICE of filing of petr. motion to change place of trial and hearing on October 24, 1962 if objection filed by October 10, 1962. Served Sept. 21, 1962.
Oct. 1, 1962	MOTION by petr. to change place of trial to San Francisco, California—GRANTED.

Date Month Day Year	Filings and Proceedings
Feb. 20, 1963	NOTICE of trial June 3, 1963, San Francisco, Calif. Served Feb. 20, 1963.
June 3, 1963	TRIAL at San Francisco, California, by Judge Arundell. Stip. of Facts with joint exhibits filed. Orig. Briefs due July 18, 1963. Reply Briefs due August 19, 1963.
	UNDER SUBMISSION—JUDGE ARUNDELL
[fol. B]	
June 14, 1963	TRANSCRIPT of proceedings of June 3, 1963 received.
July 17, 1963	ORIGINAL BRIEF filed by petitioners. Served Jul 19, 1963.
July 18, 1963	ORIGINAL BRIEF filed by respondent. Served Jul. 19, 1963.
Aug. 19, 1963	REPLY BRIEF filed by petitioners. Served Aug. 20, 1963.
Aug. 19, 1963	REPLY BRIEF filed by respondent. Served Aug. 20, 1963.
Sept. 3, 1963	FINDINGS OF FACT AND OPINION filed, Judge Arundell. Served Sep. 3, 1963. Decision will be entered for the respondent.
Sept. 3, 1963	DECISION ENTERED, Judge Arundell. Served Sep. 3, 1963.
	APPELLATE PROCEEDINGS
Dec. 4, 1963	PETITION FOR REVIEW by USCA, 9th Circuit, filed by Petrs. (Postmark date—Sacramento, Cal. —Dec. 2, 1963).
Dec. 4, 1963	PROOF OF SERVICE of petition for review on Resp. filed.
Dec. 27, 1963	DESIGNATION OF CONTENTS OF RECORD filed.
Dec. 27, 1963	PROOF OF SERVICE of Designation of Contents filed.
Dec. 30, 1963	ORDER extending time to March 3, 1964 to file record. Served Dec. 30, 1963.

BEFORE THE TAX COURT OF THE UNITED STATES

[File Endorsement Omitted]

Docket No. 2131-62

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION— Filed June 13, 1962

The above named petitioners hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency AP:Gbr:ERA dated March 15, 1962, and as the basis for our case alleges as follows:

1. The petitioners are individuals with principle residence now at Apartment B-21, Marine Corps Air Station, Cherry Point, North Carolina. The return for the period here involved was filed with the District Director of Internal Revenue, Greensboro, North Carolina.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on March 15, 1962.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar year 1958, in the amount of $180.10 of which approximately $146.30 is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

a. The Petitioners principle place of employment during calander 1958 was Iwajuni, Japan.

b. The Petitioners were considered as not being away from home for federal income tax purposes.

c. The Petitioners expenses incurred for meals while temporarily away from home constitute personal expenses.

5. The facts upon which the petitioners relies as the basis of this case are as follows:

a. The wage earning petitioners place of employment was The United States of America. His duties during 1958 were temporarily away from his principle place of employment. Marine Corps Orders established the length of tours away from home as fourteen (14) months duration (hence a temporary period, and its termination could be foreseen within a [fol. 2] fixed and reasonable short period). Marine Corps Orders also forbid the establishment of a home or domicile during this duty, even at the petitioners own expense. For these reasons, the Far East was a place of temporary employment. This is further supported by the fact that the wage earning petitioner departed from Marine Corps Air Station, El Toro (Santa Ana), California on October 1, 1957 and returned to the Marine Corps Air Station, El Toro (Santa Ana), California on December 19, 1958. During his absence from home he served at the Marine Corps Air Facility, Iwakuni, Japan, Naval Air Station, Atsugi, Japan, twice at the Naval Air Facility, Naha Air Force Base, Okinawa, and once at the Naval Air Station, Cubi Point, Phillipine Islands.

b. During the period January 1, 1958 through December 31, 1958 the wage earning petitioners location changed eleven (11) times. During these changes his home was maintained at Santa Ana, California. The petitioners claim that the United States (California) was the principle place of employment, hence home, therefore the wage earner was in fact, temporarily away from home.

c. The wage earning petitioner being temporarily away from home, attached to an Air Squadron away from home base is authorized to deduct from gross income the entire amount of mess bills. This deduction need not be offset by basic subsistance allowances.

Wherefore, the petitioners pray that this court, may try this case and determine that the $650.00 deduction from gross income claimed for meals while temporarily away from home, be allowed.

/s/ Howe A. Stidger

/s/ Betty M. Stidger
Apt. B-21, MCAS
Cherry Point, N. Carolina

[fol. 3]

[Duly Sworn to by Howe A. Stidger and Betty M. Stidger. Jurats Omitted in Printing]

[fol. 4]

EXHIBIT "A" TO PETITION.

NOTICE OF DEFICIENCY

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OFFICE OF REGIONAL COMMISSIONER
APPELLATE DIVISION, ATLANTA REGION
P. O. Drawer 838
Greensboro, North Carolina

MAR 15, 1962

In Reply Refer to
AP:Gbr:ERA

Taxable Year Ended	Deficiency
12/31/58	$180.10

Mr. Howe A. Stidger and
Mrs. Betty M. Stidger
Husband and Wife
MOQ B-21
Cherry Point, North Carolina

Dear Mr. and Mrs. Stidger:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of your income tax liability for the above-noted taxable year(s) discloses a deficiency (or deficiencies) in the amount(s) shown above. The attached statement shows the computation of the deficiency or deficiencies.

IF YOU AGREE to this determination, please sign the enclosed agreement, Form 870, and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the

expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington, 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner

By /s/ James F. Paris
JAMES F. PARIS
Associate Chief

Enclosures:

Statement
Agreement, Form 870
Addressed envelope

[fol. 5]

ENCLOSURE TO EXHIBIT A

STATEMENT

Howe A. Stidger and Betty M. Stidger, Husband and Wife
MOQ B-21, Cherry Point, North Carolina

Address on Return:
30 Fike Drive, Havelock, North Carolina

Year	Deficiency
1958	$180.10

Adjustment to Income

Tazable income as disclosed by return		$3,855.00
Unallowable deductions and additional income:		
(a) Expenses for meals, lodging and laundry	$800.00	
(b) Medical expenses	31.80	831.80
Taxable income adjusted		$4,686.80

Explanation of Adjustments

(a) The duduction of $800.00, claimed for meals of $650.00 and for lodging and laundry of $150.00, has been disallowed because it has not been established that the amount claimed constitutes an ordinary and necessary business expense.

(b) As the result of the increase in adjusted gross income as shown in item (a), the deduction for medical expenses allowable is adjusted, computed as follows:

Adjusted gross income as disclosed by return	$7,445.00
Add: Expenses disallowed, item (a)	800.00
Adjusted gross income as corrected	8,245.00
Cost of medicines and drugs	$ 95.00
Less: 1% of $8,245.00	82.45
Balance	12.55
Other medical and dental expenses	338.00
Total	$ 350.55
Less: 3% of $8,245.00	247.35
Medical expense deduction allowable	$ 103.20
Claimed on return	135.00
Excess disallowed	$ 31.80

Computation of Tax

Taxable income adjusted	$4,686.80
Income tax liability	951.10
Liability as disclosed by return, Acct. # CR 246416	771.00
Deficiency in income tax	$ 180.10

[fol. 9]

BEFORE THE TAX COURT OF THE UNITED STATES

[File Endorsement Omitted]

[Title Omitted]

ANSWER—Filed July 31, 1962

THE RESPONDENT, in answer to the petition filed in the above-named case, admits and denies as follows:

1 and 2. Admits the allegations set forth in paragraphs 1 and 2 of the petition.

3. Admits that the deficiency as determined by the Commissioner is in income tax for the taxable year 1958 in the amount of $180.10. Denies the remaining allegation set forth in paragraph 3 of the petition.

4. a. to c. Denies the allegations of error set forth in subparagraphs a to c, inclusive, of paragraph 4 of the petition.

5. a. Admits that petitioner Howe A. Stidger departed from Marine Corps Air Station, El Toro (Santa Ana), California, on October 1, 1957, and returned to the Marine Corps Air Station, El Toro (Santa Ana), California, on December 19, 1958, and that during his absence he served at the Marine Corps Air Facility, Iwakuni, Japan. Denies the remaining allegations set forth in subparagraph a of paragraph 5 of the petition.

[fol. 10] b. & c. Denies the allegations set forth in subparagraphs b and c of paragraph 5 of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

[fol. 15]

BEFORE THE TAX COURT OF THE UNITED STATES

WASHINGTON

February 20, 1963

149
Docket No. 2131-62

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Trial On: June 3, 1963

Trial At: Customs Courtroom
United States Appraisers Building
630 Sansome Street
San Francisco, California

NOTICE SETTING CASE FOR TRIAL

TAKE NOTICE that the above-entitled case is set for trial before a Division of the Tax Court of the United States as indicated above.

The calendar for that Session will be called at 10:00 A.M. on the date indicated and you will be expected to answer the call at that time and be prepared when the case is reached for trial. Failure to appear will be taken as cause for dismissal in accordance with Rule 27(b) (3) of the Court's Rules of Practice.

You are expected to be familar with the Court's Rules of Practice in all other respects.

Your attention is called particularly to Rule 31(b) which requires that the parties stipulate facts and evidence to the fullest possible extent prior to the call of the

calendar. You should confer with your adversary promptly in order to comply with that rule.

/s/ Howard P. Locke
Clerk of the Court.

Ex parte motions for continuance of trial, filed 30 days or less prior to the first day of the Session, will be calendared for hearing at calendar call at the Session unless the Court, in its discretion, directs otherwise in exceptional circumstances.

To: Howe A. Stidger and
Betty M. Stidger
2137 Yorkshire Road
Sacramento 15, California

[fol. 16]

(SEAL)

BEFORE THE TAX COURT OF THE UNITED STATES

MINUTES OF PROCEEDINGS

Title of case HOWE A. STIDGER AND BETTY M. STIDGER Docket No. 2131-62

Date called ..... Place .....
Transcript Ordered .....

Date of Trial June 3, 1963 Place SAN FRANCISCO Transcript Ordered Yes

Judge C. R. ARUNDELL Reporter John E. Lewis

Counsel For Petitioner Howe A. Stidger, Pro Se
For Respondent Arthur P. Generaux

Proceedings and Action: SUBMITTED

Filed during Session (and action if necessary) Stipulation of facts and Joint Exhibit 1-A attached.

Original briefs: Petitioner July 18, 1963 Respondent July 18, 1963

Reply briefs: Petitioner August 19, 1963 Respondent August 19, 1963

Time consumed in trial 35 min. Signed /s/ James W. Kemper JAMES W. KEMPER, *Deputy Clerk.*

WITNESSES

For Petitioner	For Respondent
Howe A. Stidger	(None)

EXHIBITS

Petitioner's (Number and describe)

2-photostat re: discharge USMC
3- " " " "
4-copy of document

Respondent's (Letter and describe)

(None)

[fol. 17]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 2131-62

[File Endorsement Omitted]

[Title Omitted]

STIPULATION OF FACTS—Filed June 3, 1963

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto are incorporated in this stipulation and made a part thereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

1. Petitioners filed their 1958 joint income tax return with the Director of Internal Revenue at Greensboro, North Carolina. Said return is to be received in evidence as Exhibit 1-A.

2. On September 4, 1962, petitioners' address became 2137 Yorkshire Road, Sacramento 15, California.

[fol. 18] 3. Petitioner-husband, hereinafter referred to as petitioner unless otherwise designated, was a Captain in the United States Marine Corps during the taxable year 1958. As of that time, he had served in the Corps for many years.

4. On October 1, 1957, petitioner was assigned to duty in the far east with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana) California.

5. Dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, in the far east, were prohibited by Marine Corps orders to accompany said personnel or establish homes in the far east.

6. On October 1, 1957, petitioner departed from El Toro, California. Petitioner's itinerary from October 1957 to December 1958 was as follows:

1 Oct 57 to 20 Feb 58—	Departed MCAS El Toro, Calif., traveled to, and duty at Iwakuni, Japan
21 Feb 58 to 7 Mar 58—	Cubi Point, Phillipine Islands
8 Mar 58 to 19 Apr 58—	Iwakuni, Japan
20 Apr 58 to 23 May 58—	Naha AFB, Okinawa
24 May 58 to 10 Aug 58—	Iwakuni, Japan
11 Aug 58 to 29 Aug 58—	Yokosuka, Japan
30 Aug 58 to 1 Sep 58—	Iwakuni, Japan

[fol. 19]

2 Sep 58 to 19 Sep 58—	San Diego, Calif.
20 Sep 58 to 25 Sep 58—	Iwakuni, Japan
26 Sep 58 to 10 Oct 58—	Naha AFB, Okinawa
11 Oct 58 to 14 Dec 58—	Iwakuni, Japan
15 Dec 58 to 19 Dec 58—	Travel to MCAS El Toro, Calif.

7. Throughout the entire year 1958, petitioner received a housing allowance of approximately $102.50 per month and subsistence allowance of approximately $42.50 per month.

8. During the periods that petitioner was located at Iwakuni, Japan, he received free lodging in addition to his housing and subsistence allowance but was not in travel status and he therefore did not receive free meals.

9. During the year 1958, petitioner was placed in travel status for forty-nine days and, in addition to his normal housing and subsistence allowance, his expenses for meals and lodging were reimbursed. Petitioner does not claim travel expenses for the forty-nine days that he received reimbursement for the costs of meals and lodging.

10. For the taxable year 1958, petitioner claimed travel expenses as follows:

Meals	$650.00
Lodging and Laundry	150.00
Total	$800.00

[fol. 20] Petitioner now concedes that the sum of $150.00 claimed as lodging and laundry was in error in that lodging was furnished and the remaining portion of the $150.00 was of a personal nature. Therefore, the only issue remaining before the Court is whether or not petitioners are entitled to a deduction for travel expenses consisting of meals while at Iwakuni, Japan, in the amount of $650.00 for the taxable year 1958.

/s/ Howe A. Stidger
Petitioner

/s/ Betty M. Stidger
Petitioner

/s/ Crane C. Hauser
Chief Counsel
Internal Revenue Service

[fol. 21]

JOINT EXHIBIT "1-A" TO STIPULATION OF FACTS

Post-Refund Audit

O.A.

Form 1040 — Treasury Department Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN—1958

For the Calendar Year 1958 or Other Taxable Year Beginning 1 JAN 1958, 1958 Ending 31 DEC 1958

(PLEASE TYPE OR PRINT)

Name: HOWE A. AND BETTY M. STIDGER

(If this is a joint return of husband and wife, use first names and middle initials of both)

Home address: 30 FIKE DRIVE

(Number and street or rural route)

HAVELOCK, N. CAROLINA

(City, town, or post office) (Postal zone number) (State)

OR 246416

Your Social Security Number	Occupation	Wife's Social Security Number	Occupation
234 30 8151	U.S. MARINE	UNKNOWN	HOMEMAKER

If Income Was All From Salaries and Wages, Use Pages 1 and 2 Only. See Page 3 of the Instructions.

Exemptions

1. Check blocks which apply. Check for wife if she had no income or her income is included in this return.
   - (a) Regular $600 exemption ..... ☑ Yourself ☑ Wife
   - (b) Additional $600 exemption if 65 or over at end of taxable year. ☐ Yourself ☐ Wife
   - (c) Additional $600 exemption if blind at end of taxable year. ☐ Yourself ☐ Wife

   Enter number of exemptions checked → 2
2. List first names of your children who qualify as dependents; give address if different from yours. GLEN LEE; DAVIN DEAN — Enter number of children listed → 2
3. Enter number of exemptions claimed for other persons listed at top of page 2 0
4. Enter the total number of exemptions claimed on lines 1, 2, and 3 4

Income

5. Enter all wages, salaries, bonuses, commissions, tips, and other compensation before payroll deductions (including any excess of expense account or similar allowance paid by your employer over your ordinary and necessary business expenses. See instructions, pp. 5-6.)

Employer's Name	Where Employed (City and State)	(a) Wages, etc.	(b) Income Tax Withheld
U.S. MARINE CORPS	MCAS CHERRY POINT N.C.	$ 8545 —	$ 1046 40
LESS EXCLUDABLE EXPENSES INCREASED ALLOWANCE		800 —	
	Enter totals here →	$ 7745 —	$ —

6. Less: Excludable "Sick Pay" in line 5 (See instructions, page 7. Attach required statement.) ..... 300 —
7. Balance (line 5 less line 6) ..... $ 7445 —
8. Profit (or loss) from business from separate Schedule C ..... ♦
9. Profit (or loss) from farming from separate Schedule F ..... ♦
10. Other income (or loss) from page 3 (dividends, interest, rents, pensions, etc.) ..... ♦
11. ADJUSTED GROSS INCOME (sum of lines 7, 8, 9, and 10) ..... ♦ $ 7445 —

If either you or your wife had more than one employer and the social security tax (FICA) withheld from wages exceeded $94.50, see instructions, page 5.

Unmarried or legally separated persons qualifying as "Head of Household," see instructions, page 7, and check here ☐

Widows and widowers with dependent child who are entitled to the special tax computation, see instructions, page 8, and check here ☐

Tax due or refund

12. Tax on income on line 11. (If line 11 is under $5,000, and you do not itemize deductions, use Tax Table on page 16 of instructions to find your tax and check here ☐. If line 11 is $5,000 or more, or if you itemize deductions, compute your tax on page 2 and enter here the amount from line 9, page 2) ..... $ 771 —

If income was all from wages, omit lines 13 through 16

13. (a) Dividends received credit from line 5 of Schedule J ..... $
    (b) Retirement income credit from line 12 of Schedule K ....
14. Balance (line 12 less line 13) .....
15. Enter your self-employment tax from separate Schedule C or F .....
16. Sum of lines 14 and 15 .....

17. (a) Tax withheld (line 5 above). Attach Forms W-2, Copy B ..... $ 1046 40
    (b) Payments and credits on 1958 Declaration of Estimated Tax (See page 8, Instructions.) ●
    District Director's office where paid _____
18. If your tax (line 12 or 16) is larger than your payments (line 17), enter the BALANCE DUE here → $
    Pay in full with this return to "Internal Revenue Service." If less than $1.00, file return without payment.
19. If your payments (line 17) are larger than your tax (line 12 or 16), enter the OVERPAYMENT here → $ 275 40
    If less than $1.00, the overpayment will be refunded only upon application.
20. Amount of line 19 to be: (a) Credited on 1959 estimated tax $ _____ (b) Refunded $ 275.40

Did you receive an expense allowance or reimbursement, or charge expenses to your employer? ☐ Yes ☑ No (See page 6, Instructions)
If "Yes," did you submit an itemized accounting of expenses to your employer? _____ ☐ Yes ☑ No

County in which you live.	Is your wife (husband) filing a separate return for 1958? If "Yes," enter her (his) name.	Do you owe any Federal tax for years before 1958?
CRAVEN	☐ Yes ☑ No	☐ Yes ☑ No

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return. If the return is prepared by a person other than the taxpayer, his declaration is based on all the information relating to the matter required to be reported in the return of which he has any knowledge.

Howe A. Stidger 13 APR 1959 — Betty M. Stidger Apr 13 1959

(Taxpayer's signature and date) (If this is a joint return, BOTH HUSBAND AND WIFE MUST SIGN) (Wife's signature and date)

(Signature of preparer other than taxpayer) (Address) (Date)

EXHIBIT NO. 21

18

● ATTACH COPY B OF FORM(S) W-2 HERE ●

Form 1040—1970 **EXEMPTIONS FOR PERSONS OTHER THAN YOUR WIFE AND CHILDREN** Page 2

Name	Relationship	Months lived in your home. If born or died during year also write "B" or "D"	Did dependent have gross income of $600 or more?	Amount YOU furnished for dependent's support. If 100%, write "All"	Amount furnished by OTHERS including dependent
				$	$

Enter on line 3, page 1, the number of exemptions claimed above.
→ If an exemption is based on a multiple-support agreement of a group of persons, attach information described on page 5 of instructions.

ITEMIZED DEDUCTIONS—IF YOU DO NOT USE TAX TABLE OR STANDARD DEDUCTION

If Husband and Wife (Not Legally Separated) File Separate Returns and Own Itemized Deductions, the Other Must Also Itemize
State to whom paid. If necessary write more than one item on a line or attach additional sheets. Please put your name and address on any attachments.

Contributions	CHARITABLE ORGANIZATIONS, RED CROSS, POLIO, MULTI SCLEROSIS, UNITED FUND, SALVATION ARMY, NAVY HEALTH DRIVE, TB SEALS	100 —
	RELIGIOUS ORGANIZATIONS	25 —
	Total paid but not to exceed 20% of line 11, page 1, except as described on page 8 of instructions....	$ 125 —
Interest	COLWELL CO. WILSHIRE BLVD, LOS ANGELES, CALIF	520 —
	Total interest	520 —
Taxes	REAL ESTATE 1350 S. HARBOR WAY, SANTA ANA, CALIF	201 —
	CAR LICENSE CALIF	41 —
	CALIF SALES TAX	84 —
	GASOLINE TAX 400 gl. @ .06/gal	24 —
	Total taxes	350 —

Medical and dental expense (65 or over, see instructions, page 10)

Submit itemized list. Do not enter any expense compensated by insurance or otherwise

1. Cost of medicines and drugs IN EXCESS of 1 percent of line 11, page 1	$ 20.55	
2. Other medical and dental expenses	338.00	
3. Total	$ 358.55	
4. Enter 3 percent of line 11, page 1	223.35	
5. Allowable amount (excess of line 3 over line 4). (See instructions, page 10, for limitations)		135 —

Other Deductions (See page 10 of instructions and attach information required)	UNIFORM ACCESSORIES	60 —
	Total	60 —
TOTAL DEDUCTIONS (Enter here and on line 2 of Tax Computation, below)		$ 1190 —

TAX COMPUTATION—IF YOU DO NOT USE THE TAX TABLE

1. Enter Adjusted Gross Income from line 11, page 1	$ 7445 —
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized and line 1, above, is $5,000 or more: (a) a married person filing a separate return enter $500; (b) all others enter 10 percent of line 1, or $1,000, whichever is smaller	1190 —
3. Balance (line 1 less line 2)	6255 —
4. Multiply $600 by total number of exemptions claimed on line 4, page 1	2400 —
5. TAXABLE INCOME (line 3 less line 4)	3855 —
6. Tax on amount on line 5. Use appropriate tax rate schedule on page 15 of instructions. Do not use Tax Table on page 16	771 —
7. If you had capital gains and the alternative tax applies, enter the tax from separate Schedule D	
8. Tax credits. If you itemized deductions, enter: (a) Credit for income tax payments to a foreign country or U. S. possession (Attach Form 1116) $ ____ (b) Tax paid at source on tax-free covenant bond interest and credit for partially tax-exempt interest (c) Total. Enter here →	
9. Enter here and on line 12, page 1, the amount shown on line 6 or 7 less amount claimed on line 8(c)	$ 771 —

[illegible]

22

[Tol. 22]

19

[fol. 23]

ATTACHMENT TO INCOME TAX RETURN 1958

HOWE A. and BETTY M. STIDGER

STATEMENT: Excludable Expenses from Gross Pay

Excludable expenses claimed for duty with U. S. Marines, Aviation Fleet Marine Forces, Pacific. Assigned duties away from home for over 10 months, during calendar 1958

Meals (Closed Mess When Available)	$65.00 per month x 10 =	$650.00
Lodging (BOQ's) and Laundry	$15.00 per month x 10 =	$150.00
Total Excludable Expenses Claimed		$800.00

/s/ Howe A. Stidger

STATEMENT: Excludable Sick Pay

Claimed for period 11 Aug. 1958 through 29 Aug. 1958. Hospitalized for surgery (hernia) average weekly income $165.00. Maximum allowance of $100.00 per week claimed.

3 Weeks @ $100 Total Deductible $300.00

/s/ Howe A. Stidger

[fol. 24]

ATTACHMENT 1958 INCOME TAX

HOWE A. and BETTY M. STIDGER

Medical and Dental Expenses

Cost of Medicine

Pence Pharmacy, So. Bristol, Santa Ana, Calif.	$ 70.00
Bristol Drug, 4th & N. Bristol, Santa Ana, Calif.	25.00
Total	$ 95.00
1% of Line 11	74.45
	$ 20.55

Other Medical

Dr. Underwood DDS, Newport Beach, Calif.	$ 45.00	
Dr. Bell MD, N. Broadway, Santa Ana, Calif.	150.00	
Dr. Imagawa MD, S. Broadway, Santa Ana, Calif.	143.00	
		338.00
Total		358.55
Less 3% of Line 11		223.35
Total Medical Deductible		$135.20

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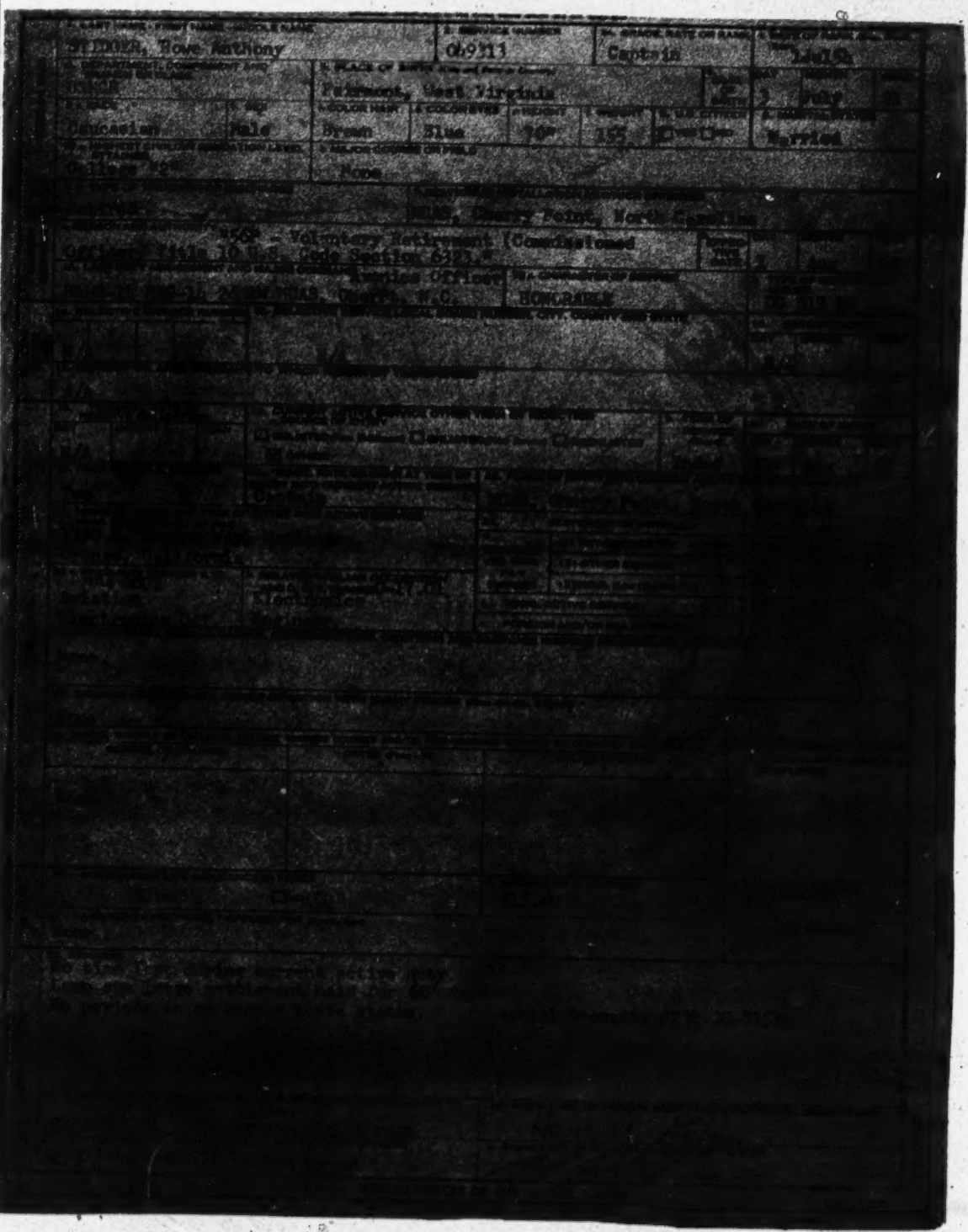
[fol. 26]

PETITIONER'S EXHIBIT 3



[fol. 27]

PETITIONER'S EXHIBIT 4

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
Washington 25, D.C.

DIRECTIVES CONTROL COPY
(Return to ABX)

MCO 1300.8B
AO1-kb
1 Jul 1958

CANCELLED BY MCO 1300.8C

MARINE CORPS ORDER 13.00.8B Ch. 1

Subj: Overseas tours of duty and overseas movement of dependents.

Ref: (a) DOD Directive 1315.7 as modified 27 Aug 1957 (NOTAL)
(b) Para 7054 7105 and 7157 MarCorMan
(c) MCO 1752.1

1. *Purpose.* To establish overseas tours of duty in certain Marine Corps commands and activities located beyond the continental limits of the United States, and policies concerning overseas movement of dependents of Marine Corps personnel serving in these commands and activities.

2. *Cancellation.* MCO 1300.8A and MCO 1751.2A.

3. *Suspension.* Those portions of reference (b) which are in conflict with this order are hereby suspended pending revision.

4. *Definitions*

a. *Overseas Duty.* Military duty performed while assigned to a military installation or activity permanently located at a land station outside the continental limits of the United States.

b. *Tour Length.* Begins with the day of departure from the continental limits of the United States and

terminates with the day of return thereto on permanent change of station.

c. *Standard Tour.* The period of time established for duty at a specific location.

d. *Authorized Dependents.* Military dependents authorized by statute to travel overseas at government expense upon permanent change of station on their sponsor, and authorized by the appropriate military commander to be present in a military dependents status for the purpose of logistical support with his command.

e. *Unauthorized Dependents:*

(1) Military dependents not authorized government-expense travel.

(2) Military dependents entitled to government-expense travel who are present in the overseas area without military authorization.

f. *Acquired Dependents.* Military dependents acquired in an overseas area in accordance with existing regulations.

5. *Standard Tours of Duty.* Standard tours of duty for overseas areas and personnel stationed there are established as follows:

a. The below tabulation indicates the prescribed standard tour of duty for each locality listed, excluding personnel assigned to attache billets, State Department guard billets, and Fleet Marine Force units permanently assigned in the Far East:

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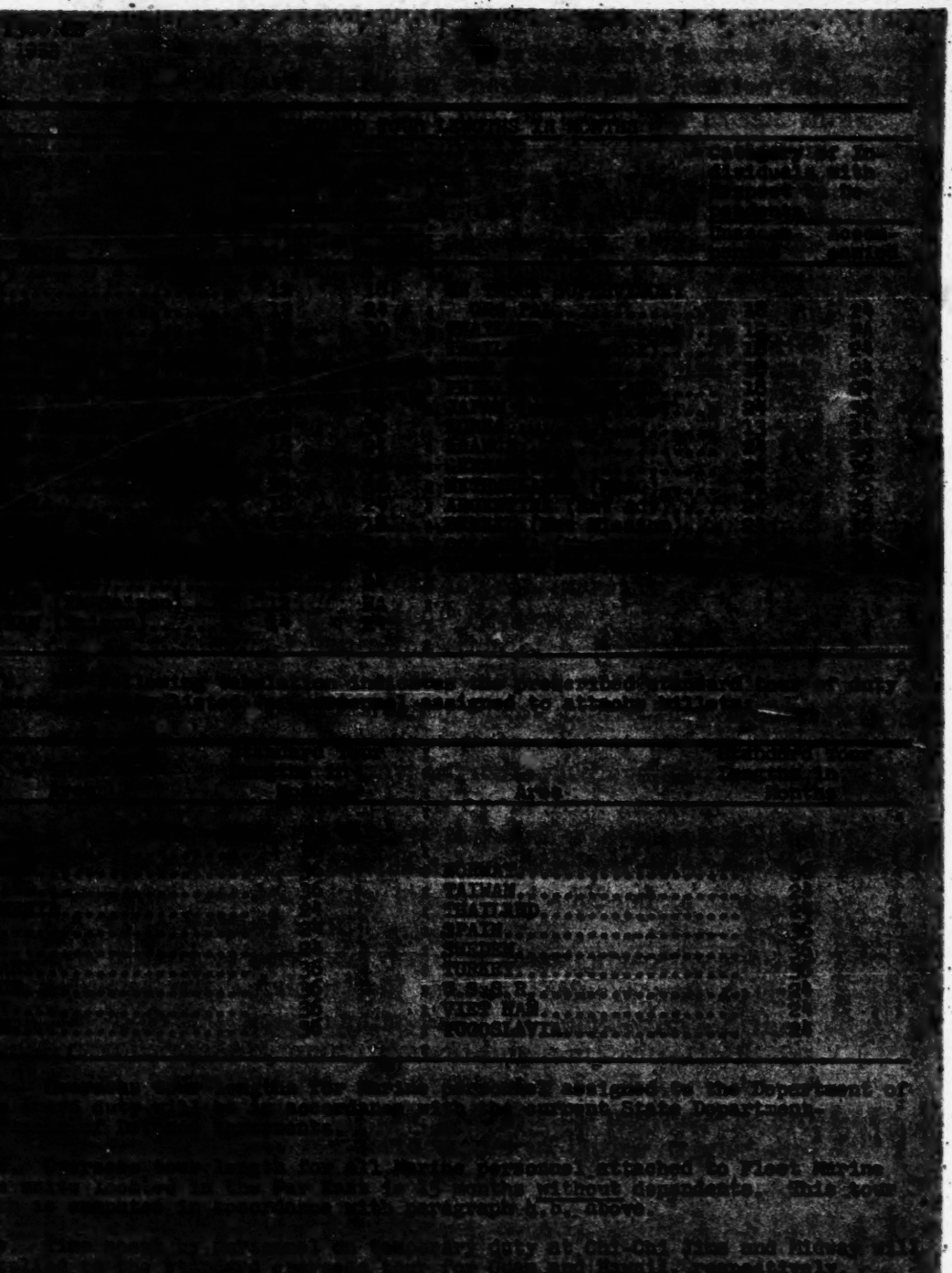
[fol. 28]



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[fol. 29] 6. *Extension of Overseas Tours*

a. Normally, extension of overseas tours in one type activity, and particularly in one geographic location beyond the standard tour will not be permitted except in case of hardship. The Commanding General, Fleet Marine Force Pacific is granted authority, when individual cases warrant, to extend overseas tour for enlisted Marines who voluntarily request such an extension. Officer personnel will submit requests for extensions to this Headquarters.

b. In granting extensions, caution must be exercised to insure that overseas tour dates expire evenly throughout the calendar year. This is necessary in order to provide for concurrent travel of dependents and for the timely arrival of replacements overseas.

c. Requests for extensions of tours of duty at overseas stations not under the cognizance of the Commanding General, Fleet Marine Force Pacific, will be forwarded to this Headquarters for consideration.

7. *Overseas Reassignment of Personnel*

a. Normally, upon completion of a standard tour, as listed in paragraph 5 above, Marine personnel will be ordered to CONUS for reassignment, unless they request and are authorized reassignment to another overseas station. Officer personnel may be reassigned overseas by this Headquarters to meet Marine Corps requirements.

b. Personnel reassigned to another overseas station will be required to complete the standard tour for the reassigned overseas duty station, in addition to the previously completed tour.

c. Marine personnel desiring reassignment to another overseas duty station will submit their request to this Headquarters five months prior to completion of their current overseas tour. Forwarding authorities will indicate, when possible, their approval or disapproval of such requests based on the individual's previous record and his suitability for performance of duties commensurate with the assignment requested.

8. *Miscellaneous Instructions*

a. Periods while in confinement, hospitalized as a result of own misconduct, or temporarily returned to the

United States in connection with a humanitarian problem, will not be counted as time served on the tour of duty, and the date of rotation will be adjusted accordingly.

b. The maximum combination of overseas tours and any extensions granted in accordance with paragraph 6 will not exceed a total of five years of continuous overseas service.

9. *Overseas Movement of Authorized Dependents*

a. Marine personnel whose unexpired term of service is less than the standard overseas tour with dependents for the area to which they are assigned, will not be authorized to move their dependents overseas at government expense, unless they voluntarily extend their term of service to permit completion of the prescribed overseas tour.

b. In addition to the requirement set forth in 9.a. above, dependents will not be sent overseas at government expense unless the sponsor has a minimum of twelve months remaining on his overseas tour after dependents arrive. After dependents arrive in the overseas area, the sponsor's tour length will be readjusted to the standard tour for the area, accompanied by dependents, as listed in paragraph 5.a.

c. Marine personnel who are required to extend or reenlist in order to receive authorization for moving their dependents overseas will accomplish such extensions or [fol. 30] reenlistments prior to having less than 14 months remaining on an accompanied overseas tour for the area.

d. When computing the overseas tour length for any area, the overseas tour commences from the date the sponsor departs the United States, whether his dependents travel concurrently or join him later.

10. *Overseas Movement of Unauthorized Dependents*

a. The basis for the decision as to authorizing dependents overseas is as follows:

(1) The adverse effect that the presence of dependents might have on a unit's mission, operational readiness, or combat capability.

(2) Existence of suitable dependents' support facilities for *all* married personnel.

(3) Standards of living and the general desirability of the area.

(4) Political climate obtaining in the country concerned.

b. The result of the evaluation of these factors is that members of Fleet Marine Force units assigned to the Far East, less subordinate units stationed in Hawaii, are not authorized to have their dependents accompany them or later join them in the Far East for the purpose of domicile. Furthermore, such members are not authorized to move their household effects or automobiles to this area. This policy is not to be construed as prohibiting the travel of dependents for visits to this area as bona fide tourists for a period not to exceed 60 days, providing such visits involve no expense to the U. S. Government and are duly authorized by the U. S. Department of State, and the government of the countries to be visited for tourist purposes only.

c. In the event that dependents elect to exercise this privilege at their own expense without Marine Corps authorization, such dependents who join their sponsors overseas will be furnished only those military services or privileges in the overseas area to which they are entitled by law. This is applicable to all dependents who do not have authorized military dependency status overseas. The military services or privileges to which these dependents are entitled by law are as follows:

(1) Burial in a national cemetary.

(2) Medical care as provided in the Dependents Medical Care Act.

d. In accordance with reference (a), unauthorized dependents are to be afforded utilization of post exchanges and commissaries in areas where these privileges are afforded authorized dependents.

e. Transportation of dependents who do not have authorized military dependent status overseas will not be scheduled on a space-requirement or space-available basis either to or from the United States.

11. *Acquired Dependents*

a. Acquired dependents will be provided those privileges which are commensurate with the grade and length of service of their sponsor. These grade and service criteria are as follows:

(1) Personnel of pay grade E-4 with four or more years of service, and above.

(2) Personnel of pay grade E-4 with less than four years of service, or below.

[fol. 31] b. Acquired dependents of personnel defined in a.(1) above will be afforded those privileges outlined in paragraph 4.f. of reference (c), except that personnel assigned to the Fleet Marine Forces in the Far East will not be authorized to occupy government quarters. In addition, these dependents will be authorized space-required transportation to the United States when their sponsors receive permanent change-of-station orders thereto.

c. Acquired dependents of personnel defined in a.(2) above will be afforded those privileges outlined in paragraph 4.f. of reference (c), not to include government quarters for personnel assigned to the Fleet Marine Forces Far East. These dependents will be authorized space-available transportation to the United States when their sponsors receive permanent change-of-station orders thereto.

12. *Overseas Station Allowances.* Overseas station allowances for dependents provided by Joint Travel Regulations will be paid only to sponsors who are entitled to government space-required transportation for their dependents and who are authorized to have their dependents in the area. Sponsors who may be currently receiving such allowance and who henceforth would not be entitled to receive them pursuant to this order, will continue to be paid such allowances until their current overseas tour is completed.

13. *Effective Date*

a. This order is effective 30 June 1958.

b. Marine personnel assigned overseas duty subsequent to the above date will perform overseas tours in accordance with this order.

c. Personnel who are currently overseas and who have completed more than one-half of the previous overseas tour for the area by 30 June 1958 will complete the overseas tour in effect at the time of their departure from the United States.

d. Personnel who are currently overseas and who have completed one-half or less of the previous overseas tour for the area will complete the overseas tours tabulated in paragraph 5, recomputed from their date of departure from CONUS.

e. Personnel reassignment after effective date of this order between overseas duty stations within Security Forces, Pacific and from Security Forces, Pacific to Fleet Marine Forces Pacific, or vice versa, will be in accordance with paragraph 7 of this order.

14. *Mobilization.* In event of mobilization, this order is automatically cancelled.

15. *Reserve Applicability.* This order is not applicable to the Marine Corps Reserve.

BY COMMAND OF GENERAL R. McC. PATE

/s/ Robt. E. Hogaboom
ROBT. E. HOGABOOM
Lieutenant General, U. S. Marine Corps
Chief of Staff

DISTRIBUTION: "A"

[fol. 32]

(SEAL)

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
Washington 25, D. C.

MCO 1300.8B CH 1
A01-wfs
17 Oct 1958

MARINE CORPS ORDER 1300.8B Ch 1

Subj: Overseas tours of duty and overseas movement of dependents

1. *PURPOSE*. The purpose of this change is to delete that portion of the basic order which states that time spent while in confinement or hospitalized as a result of misconduct or while on TAD in the United States for humanitarian reasons is not creditable toward fulfilling an overseas tour of duty. Henceforth, all time spent while permanently assigned to an overseas unit is creditable toward completing an overseas assignment.

2. *ACTION*. The following pen changes are directed:

a. Delete paragraph 8.a.
b. Redesignate paragraph 8.b. as 8.a.

BY COMMAND OF GENERAL R. McC. PATE

/s/ Robt. E. Hogaboom
ROBT. E. HOGABOOM
Lieutenant General, U. S. Marine Corps
Chief of Staff

DISTRIBUTION: "A"

25 March 1963

CERTIFIED A TRUE COPY

/s/ R. L. Barrie
R. L. BARRIE
Major, USMC

[fol. 35]

BEFORE THE TAX COURT OF THE UNITED STATES

DOCKET NO. 2131-62

HOWE A. STIDGER and BETTY M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

OFFICIAL REPORT OF PROCEEDINGS—June 3, 1963

U. S. Customs Courtroom,
421 Appraisers Building,
630 Sansome Street,
San Francisco, California.
Monday, June 3, 1963.

The above-entitled matter came on for hearing, pursuant to notice at 2:25 o'clock p.m.

BEFORE:

THE HONORABLE C. R. ARUNDELL, JUDGE.

APPEARANCES:

HOWE A. STIDGER, Petitioner herein, appearing on his own behalf.

ARTHUR P. GENERAUX, JR., ESQ., on behalf of Respondent.

[fol. 37] PROCEEDINGS

THE COURT: All right, call the next case.

THE CLERK: Docket 2131-62, Howe A. Stidger and Betty M. Stidger.

MR. GENEREAUX: Arthur P. Genereaux, Jr., for the Respondent, Your Honor.

MR. STIDGER: Howe A. Stidger for the Petitioner.

THE COURT: You are appearing in person for yourself?

MR. STIDGER: Yes, sir.

THE COURT: I have read the pleading but I will give both sides an opportunity to tell me in a word what you think the point is.

OPENING STATEMENT ON BEHALF OF PETITIONER

MR. STIDGER: Your Honor, the point seems to resolve down to whether or not my expenses away from home are a deductible item or not and whether or not I was temporarily away from home or not.

THE COURT: Were you in the military service when you were away?

MR. STIDGER: Yes, I was.

THE COURT: Enlisted?

MR. STIDGER: No, sir, I was a Commissioned Officer at the time.

THE COURT: Commissioned?

MR. STIDGER: At that time, yes.

[fol. 38] THE COURT: I guess your position is that you had a permanent home where, here in California?

MR. STIDGER: That is correct, sir.

THE COURT: And when you were over in Japan you were away from it?

MR. STIDGER: Yes, sir.

THE COURT: All right, that is your position. I just wanted to see if Government counsel had the same idea.

OPENING STATEMENT ON BEHALF OF RESPONDENT

MR. GENEREAUX: If it please the Court, this case involves the Petitioner's 1948 income tax return. The Petitioners filed the return originally in Greensboro, North Carolina. They have since moved to Sacramento and requested or in Petitioner's tax return they have claimed travel expenses in the amount of $800.

Of the amount claimed $600 is attributable to the cost of meals. $150 is attributable to the cost of laundry and lodging.

THE COURT: Now, from what points, California to the Orient?

MR. GENEREAUX: This involves the entire year 1958. Petitioner husband was assigned to the Far East

throughout this period of time so it covers from January 1st 1958 to sometime in December 1958.

THE COURT: But what I don't get is the amount [fol. 39] you give for transportation—is it?

MR. GENEREAUX: No, Your Honor. Although the return originally claimed $800, $150 of this has now been conceded by the Petitioners, the $150 that was expended for laundry and lodging.

Therefore, the only amount now involved before the Court is $650 expended for meals while stationed at Iwakuni, Japan in the Far East, which was Mr. Stidger's duty station.

The entire period of assignment was from October 1st, 1957 to December 1958.

THE COURT: Was that for his personal meals or did his family go with him?

MR. GENEREAUX: As I understand it, the Petitioner husband was not permitted to bring his family to the Far East and they remained in California. This is in substance the Petitioner's argument that since they were not permitted to bring their family, since the wife and children must remain in the United States that this, therefore, is their tax home and not their duty station at Iwakuni, Japan.

As Mr. Stidger has stated, he was a Captain in the Marine Corps. He is now retired. Prior to departure to the Far East he was stationed at Cherry Point, North Carolina.

During the greater part of 1957 El Dorado, California, and then on October 1st, 1957, his entire component was [fol. 40] assigned to duty in the Far East with the First Marine Aircraft Wing, a part of the Aircraft Fleet Marine Force, Pacific, whose administrative headquarters were maintained at Marine Corps Air Station, El Toro, California.

In Paragraph 6 of the Stipulation of Facts, which I will file, there is a detailed accounting of Petitioner Husband's itinerary while stationed in the Far East.

During this entire period he spent approximately 334 days at Iwakuni, Japan, and on five different occasions left Iwakuni, always returning to Iwakuni. These five different periods total approximately 96 days.

Now, while stationed at Iwakuni, Japan he was receiving his basic subsistence and quarters allowance. In addition to that he was receiving lodging. However, he was not placed in travel status while at Iwakuni, Japan, and therefore he was not reimbursed for his meals.

The costs of these meals are $650 and this is the issue before the Court.

Now, on five different occasions Mr. Stidger was away from Iwakuni, Japan. These five different occasions totaled approximately 90 days. During those periods he was placed in travel status by the Marine Corps and he was reimbursed for his cost of meals.

Now, he has not claimed his expenses for these five periods of time, only his expenses while he was stationed [fol. 41] at Iwakuni, Japan.

Thank you, Your Honor.

THE COURT: Is there any authority for the position you take? I am bothered by the fact that you say under the regulations he was not permitted to take his family with him so that he is sort of under the necessity, you might say, in a way, of maintaining two homes.

MR. GENEREAUX: Pursuant to Marine Corps orders he was not permitted to take his family, yes, Your Honor.

Revenue ruling 55-571, if I might read it, provides, "Members of the Armed Forces of the United States on permanent duty assignment at official stations overseas are not travelling away from home and may not deduct their expenses for meals and lodging at such locations even though they are required to maintain homes in the United States for their families who are not allowed to accompany them."

THE COURT: Would you like to take the stand and be sworn and tell the whole story?

MR. STIDGER: Yes, Your Honor.

Whereupon

HOWE A. STIDGER

was called as a witness on behalf of the Petitioner and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

THE CLERK: State your name and address for the record.

[fol. 42] THE WITNESS: My name is Howe A. Stidger, 2137 Yorkshire Road, Sacramento 15, California.

During 1957 I was attached to an air squadron which was stationed in El Toro in Southern California and the squadron to which I was attached received orders to move to the Far East to serve with the First Marine Aircraft Wing, which was a part of the Aircraft Fleet Marine Force, Pacific, whose administrative headquarters were maintained at and located at El Toro, California.

While in the Far East we operated at several bases making it a total of 11 months while we were there.

The first base at which we were located was Iwakuni, and we were there approximately four months before we made a move.

From then on we were fairly frequently on the move throughout the Far East down to Okinawa, the Philippines, and throughout the Far East, a total of 11 moves.

This time in Iwakuni was reimbursed for approximately 48 days for my travel and my food expenses. The other days I was not reimbursed and not being reimbused I accrued these additional expenses I would not normally have.

In December 1958 the squadron itself returned to the United States and I came back and rejoined the squadron which then was located in Cherry Point, North Carolina, and had the same type of duties as I had had previously [fol. 43] on both the West Coast and the Far East.

This roughly covers the period of time in which I was from the United States to the Far East and returned with the same squadron.

Now, during this period I was gone I received the same pay and the same allowances as how I was right in California with the exception of 48 days, which I am not requesting that I be allowed a deduction for.

My pay in '58 was a little less than it was in '59 but this was primarily a result of my becoming eligible for a slight pay raise due to my length of time in service.

In other words, I, for practical purposes, received the same amount of mony during all periods of time.

BY THE COURT:

Q Were you a regular commissioned officer in the Marines?

A At that time, yes, sir.

Q Had you been in the service a long time?

A Yes.

Q When.

A I joined the service in 1942.

Q And continued afterwards?

A Yes, sir. Now, normally the service life does not include being separated from your family as a normal situation.

[fol. 44] Q Why was it so here?

A It comes as a result of the Marine Corps in particular being subject to a move unexpected and rapidly and during 1945 the occasion arose where there were quite a number of Marine families in China and they just about lost them and from this the U.S. Government derived the policy that they will closely evaluate all areas where Marines were sent as to whether or not their families should be allowed to accompany them and there are Marines in the Far East that do have families but they are designated as Security Forces; they are assigned to Air Stations permanently and their tours of duty run from 24 to 36 months, depending on the locality with their family.

Fleet Marine Units are assigned to a geographical area and they are expected to be ready to be moved at any moment and they do frequently move and the Petitioner is taking the position that his home is that place—well his domicile actually—the only place in which I can have a family or any kind of normal relation with my family; it was impossible to have them in the Far East and not only that; it was specifically forbidden to have my family in the Far East. Therefore, if I can't have a family or can't establish a home there, I must be away from home and the same order that forbids me to have a home there also states the length of time I shall be away from home [fol. 45] which is 15 months away which is a temporary period and this I definitely know is when it is going to sea.

THE COURT: Does the record show all the stations you were in while away?

THE WITNESS: Yes, they do. The stipulation will show it and I have documentary evidence to support my time that I am supposed to be there and the denial of home.

BY THE COURT:

Q As far as you know are the Marines the only people who have this restriction?

A Yes, Your Honor. During the time I moved throughout the Far East I was never on a base where there were no U. S. dependents, families, and in the little county in which I spent over half my time in the Far East there was adequate housing or other housing which could have been utilized for myself, if I could have been allowed to bring the family there.

Q This situation where they treat you on this assignment in a way as it would be in active war time?

A That is correct.

THE COURT: You may inquire.

MR. GENEREAUX: If Your Honor please, I neglected to file the stipulation of facts at the close of my opening statement.

THE COURT: It will be received.

[fol. 46] THE CLERK: Exhibits?

MR. GENEREAUX: Yes, attached is Exhibit 1-A, a copy of the 1958 tax return.

THE COURT: May I ask if you have any children?

THE WITNESS: Yes, I did at the time of my movement to the Far East; I had two children. One about 8 and the small child a little over one year.

CROSS-EXAMINATION

BY MR. GENEREAUX:

Q Mr. Stidger, I understand you are presently retired from the United States Marine Corps? Is that correct?

A That is correct.

Q When did you retire, sir?

A I retired last July.

Q And what rank were you when you retired?
A I was a Captain.
Q Just prior to October 1st, 1957, where was your official duty station, at that time?
A It was at Marine Corps Air Station, El Toro, California, which is Santa Ana, and I was attached to Squadron VMA 224, Marine Corps Aviation Squadron.
Q And how long were you assigned to that station approximately?
A Approximately three years, a little over two and a half, almost three years.
[fol. 47] Q Did you stay in that location that entire three years?
A No, I did not. I was temporarily gone from that location half a dozen times for periods of two to six weeks.
Q From two to six weeks?
A From the El Toro Station, yes.
Q Were you on station at that time?
A On station at that time when I was gone from two to six weeks, yes.
Q Prior to your on duty station at El Toro, what was your official duty station?
A Albuquerque, New Mexico.
Q And how long were you stationed there?
A Three years.
Q Were you actually physically in that area throughout the entire three years?
A No, I was in training from that area for periods of time on various types of maneuvers, but whenever I was gone from that area I was again reimbursed.
Q Again you were placed in travel status?
A Yes, in travel status.
Q Again you were placed in travel status while assigned away from Albuquerque, New Mexico?
A That is correct.
Q Now, on October 1, 1957, where were you assigned [fol. 48] to duty?
A To the Far East, the First Marine Aircraft Wing.
Q Was your entire component so assigned?
A Yes.
Q What was your first official duty station?

A I did not have an official duty station while in the Far East. I was attached to the First Marine Aircraft Wing, which is a mobile organization, which is capable of moving throughout the Far East at any particular time.

Q Where were you first physically located?

A At Iwakuni.

Q For approximately how long before you left?

A Five months.

Q Five months?

A Approximately.

Q While at Iwakuni were you receiving a basic subsistence and quarters allowance?

A While at Iwakuni I received the same basic subsistence and quarters allowance I received while in the United States.

Q Was that approximately $145 a month?

A Approximately, yes.

Q Were you receiving lodging while at Iwakuni, Japan?

A Yes.

Q Were you placed in travel status while at Iwakuni, [fol. 49] Japan by the Marine Corps?

A No.

Q Did you have to pay for your own meals?

A Yes.

THE COURT: Did you eat most anyplace or did you eat at a Government mess?

A I ate at the Government Mess most every opportunity that I had; it was not always possible with my duties to be available and the cost of meals at the Government Mess are approximately $65 a month.

Q On five different occasions you left Iwakuni, Japan, did you not?

A Yes.

Q And thereafter you each time returned to Iwakuni, Japan?

A Yes.

Q Your first left Iwakuni and went to the Philippine Islands and were there from February 1 to March 7th; were you not?

A Yes.

Q And during that period of time you were placed in travel status?

A Yes.

Q Were you reimbursed for your meals?

A I was not reimbursed during the entire period; they [fol. 50] sent me to the Philippine Islands on field maneuvers with other Marine units and we were reimbused for our actual days of travel, which is two days down and two days back, which is four days for that particular period you are talking about which were reimbursed.

Q This then accounts for the fact that you were only claiming meals for 48 days when in fact you were away from Iwakuni 90 some odd days, is this true?

A That is correct.

Q Might we generally state that on each of these occasions that you left Iwakuni, Japan, you were again placed in travel status?

A Yes.

Q And you were reimbursed for meals to the extent of 48 days for these five periods of time.

THE COURT: Might I get that clear?

You are at one station and you are sent to another; you were reimbursed during the actual travel period but when you got to the actual station you were not reimbursed?

THE WITNESS: That is correct.

THE COURT: Explain that a little clearer as to when they allowed reimbursement and when they did not.

THE WITNESS: All the services have the same pay regulations and when you go to certain well-established military installations they frequently know you are com- [fol. 51] ing ahead of time and they make preparations for you on a large scale maneuver and these are designated in your orders as field duties and termed field duties.

THE COURT: That there will be a general mess available for you and that quarters will be provided and so if these things are provided then the service's only expense is your actual travelling from one spot.

THE WITNESS: For which we are reimbursed.

BY THE COURT:

Q You are in those places furnished your meals free?

A No, sir, we have to pay for our meals and then we are subsequently reimbursed if the orders are so written.

If the orders include the term "field duty" we are not reimbursed; they are at our own expense.

Q And if they are designated some other way you are?

A That is right.

Q Now, what is the other way?

A If the orders do not include the term "field duty" we are not reimbursed except for the days actually involved in travel.

BY MR. GENEREAUX:

Q Mr. Stidger, isn't it a fact that you are only reimbursed for the meals if the orders provide you are on temporary assignment or travel status?

A That is correct.

[fol. 52] Q Can you explain then why you were not reimbursed for meals while stationed at Iwakuni, Japan?

A Yes, I can. When I was sent to Iwakuni, I was sent with an air squadron and this is no different from the transfer of any other air squadron and most air squadrons are permitted to take their families with them because they are going to be located at a permanent base. Marine units are not located at a permanent base.

Q Well, the fact that you are not permitted to bring your family with you, does this mean that they were then going to make you pay for your own meals?

A That is correct. All the Commissioned Officers in all the Armed Services all pay for their meals.

Q If they are at an official duty station?

A If they are not at an official duty station they pay for their meals but they pay—

Q But they are reimbursed for those meals if they are aboard ship or on temporary assignments of travel status: is that correct?

A Yes.

Q Did you receive individual travel orders?

A No, because the unit I was attached to went to the Far East but after I arrived to the Far East on movement through the area I had orders for.

Q Did you ever receive individual orders?

[fol. 53] A Yes.

Q Were you on a classified assignment?

A The squadron was on a classified assignment.

Q And isn't this the reason why you were not permitted to bring your family to Iwakuni, Japan?

A No, sir.

THE COURT: What is the situation of that classified assignment?

THE WITNESS: It means there is something regarding the movement of the squadron which they don't want to become general world-wide known or publicly known; it may not be any particular secret.

BY MR. GENEREAUX:

Q Did this involve the movement of the squadron or certain things located within the area?

A The squadron moved from the United States to the Far East taking its airplane.

Q Isn't it true that the reason that this was a classified assignment was because there were certain weapons in the area that the United States Government did not want diclosed.

A Yes, this is true, but I don't wish to be interrogated further on that, Your Honor.

MR. GENEREAUX: I don't mean to pursue that further.

BY MR. GENEREAUX:

[fol. 54] Q You testified that you made 11 moves throughout this period of time from October 1957 through October 1958?

A Yes.

Q Mr. Stidger, in your stipulation of facts there are set forth five different moves. Can you explain the differences in those?

A You are counting a different way than I am.

When the squadron first moved from the area of Japan to the Philippines there was no assurance that we would

come back to Japan even though our orders said on completion of this duty you will return—I believe it said—on completion of this duty you will return to your station; however, the station could be anywhere within the Far East.

Q When were you directed to return to Iwakuni each time?

A By written orders I was not directed to return to Iwakuni; I received orders as to where we would go and when it came time to return, fortunately we did return to Iwakuni.

Q How long all together were you stationed in the Far East?

A Fourteen months?

Q And where was your wife and children during this time?

A Santa Ana, California.

Q When you returned to the United States where did [fol. 55] you then reside?

A I returned to Santa Ana, California and immediately within a matter of a few weeks moved my family to the East Coast.

Q And how long did you remain there approximately?

A Three years, three and a half; my family was located then on the East Coast for three and a half years but I was not always there.

Q And thereafter where did you locate?

A My squadron was located on the East Coast at Cherry Point. I may not understand your question.

Q You testified when you returned to the United States you returned to Santa Ana, California.

A Yes.

Q You and your family then moved to the East Coast?

A That is correct.

Q I assumed you transferred to the East Coast?

A That is correct.

Q And you remained at what point on the East Coast?

A Cherry Point, North Carolina.

Q For three and a half years?

A Yes, until I retired.

Q And you retired at Cherry Point, North Carolina?
A Yes.
Q And then you returned to California, did you?
[fol. 56] A Yes.
Q Mr. Stidger, isn't it a fact that there are other branches of the service that are not permitted to bring their families with them when they travel to an overseas duty station?
A That is correct.
Q This is not just applicable to the United States Marine Corps?
A The part which forbids, to the best of my knowledge, no other branch of service has this restriction on their dependents travel.
Q For any area?
A No, not for any area; for the Far East.
MR. GENEREAUX: No more questions, Your Honor.
THE COURT: Have you anything else you would like to tell us or do you think that covers it?
THE WITNESS: I think that covers it, but if the Court please, I have some documents I would like to enter regarding my testimony.
THE COURT: You may step down. Show them to counsel first.

(Witness excused.)

COLLOQUY BETWEEN COURT, CLAIMANT AND COUNSEL

MR. STIDGER: Your Honor, I would like to enter as exhibits the DD Forms 214 which are entitled "Armed Forces of the United States Report of Transfer or Discharge."
[fol. 57] Now, both of these documents show that my official home of record from the 24th of July, 1956 until the 11th of August 1961, was Santa Ana, California.
THE COURT: Do you have any objection to those?
MR. STIDGER: This information is given in Item 23 of these papers.
MR. GENEREAUX: Well, this is a self-serving document. I have no objection that the document is in exist-

ence, but it was filled out obviously by Petitioner and/or his wife.

THE COURT: Well, if you don't have any objection we can put them in.

Of course the home for tax purposes may not be just where your domicile is. It is usually associated with where your place of work is, but of course, if you are temporarily away from there it is another question.

MR. STIDGER: With the Court's permission I would like to enter photostatic copies.

THE COURT: Without objection they are received. Can you mark them separately?

THE CLERK: Yes, sir.

THE COURT: Mark them separately.

THE CLERK: Petitioner's Exhibits 2 and 3 admitted in evidence.

(Petitioner's Exhibits 2 and 3 were marked for iden-
[fol. 58] tification and received in evidence.)

THE COURT: Anything else?

MR. STIDGER: Yes, Your Honor, I would like to submit photostatic copies of my withholding tax statement to indicate that I did not receive income in excess of my normal allowances during 1958.

These statements show that during 1958 I received $8,545 while in 1959 I received $8,980. They tend to back my statement. I did not receive an additional allowance.

MR. GENEREAUX: If the Court please, I think these are immaterial and irrelevant.

MR. STIDGER: If they are immaterial and irrelevant then I don't think it is necessary to submit them, sir.

THE COURT: Is that all?

MR. STIDGER: No, Your Honor, one other reference I would like to submit is the Marine Corps order for bidding.

THE COURT: Is that a Marine Corps order?

MR. STIDGER: Yes, Your Honor. And it is a true copy.

MR. GENEREAUX: It is dated 1958 whereas his tour of duty began in 1957.

THE COURT: Were these instructions in effect when you were required to go to the Orient?

MR. STIDGER: No, sir, not while I was required to [fol. 59] go but while I was there I became affected under this old—

THE COURT: But was it in effect during the years when you were there?

MR. STIDGER: Yes, it was.

THE COURT: It wasn't a different order.

Well, I think upon that statement I am going to take it.

MR. GENEREAUX: Might I ask Petitioner, did this document come into existence before July 1st, 1958?

MR. STIDGER: No.

MR. GENEREAUX: Were there similar orders that were identical to this before July 1st, 1958?

MR. STIDGER: Yes, there were, not identical, no. The orders previously to this one say 14 months and this one says 15 months. However, this is the order which controlled the ending part of my tour of duty in the Far East.

The only difference so far as I am concerned is the numbering on the order.

MR. GENEREAUX: This, I take it, was not directed specifically to you but to your component?

MR. STIDGER: All members of the U. S. Marine Corps are subject to orders. This order is directed specifically to me and to all members of the Marine Corps.

THE COURT: You were controlled by this order?

MR. STIDGER: Yes, I was.

[fol. 60] MR. GENERAUX: No objection, Your Honor.

THE COURT: It will be received.

THE CLERK: Petitioner's Exhibit No. 4 received.

(Petitioner's Exhibit No. 4 was marked and received into evidence.)

MR. STIDGER: Your Honor, Petitioner has no more to offer at this time.

THE COURT: Have you anthing further?

MR. GENEREAUX: Nothing further, Your Honor.

THE COURT: We will close the record and we will give the usual time for briefs under the rules.

THE CLERK: Forty-five and 30 days, Your Honor.

THE COURT: I think that is sufficient. Do you have a date certain?

THE CLERK: July the 18th and August the 19th.

MR. GENEREAUX: If the Court please, may I have leave of the Court to withdraw the exhibits and make photostats of them?

THE COURT: The general rule is that you can withdraw your own exhibits and if Mr. Stidger does not object you can withdraw all the exhibits for photostating.

Do you have any objection?

MR. STIDGER: No, I have no objection.

THE COURT: There is a point in this case entirely new to me where I am troubled with the case where the [fol. 61] Marine Corps will not let an officer on certain duty bring his family and he has to maintain a home for them, to then say he isn't away from home.

Now, that general rule you have, has in mind the general case where there can be a family but they are not supposed to take their family and if that is true then I wouldn't very much question it.

Now, what about it? They say, "Well, you ought to be up in front with me; it wouldn't take you that far even though they might be stationed there for a year."

Now, if there is something more than a ruling, there are some holdings I would like to know. I think you might inquire whether this regulation was intended to cover cases where the military will not permit a family to be taken.

MR. GENEREAUX: If the Court please, the ruling includes those instances where the member of the Armed Services is not permitted to bring his family.

THE COURT: Well, I would be glad to get what help I can in the brief, and direct it if you will to the real points in the cases that are cited.

Now, we are having a lot of cases along the line, not military cases, but others.

Do you have the dates for briefs?

THE CLERK: Yes, sir, I have.

THE COURT: And you have given them.

[fol. 62] THE CLERK: Yes, sir.

THE COURT: All right, if that is all, we will go over until 10:00 o'clock tomorrow morning.

(Whereupon, the above-entitled matter was closed.)

[fol. 63]

BEFORE THE TAX COURT OF THE UNITED STATES

HOWE A. STIDGER and BETTY M. STIDGER, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

40 T. C. No. 97

Docket No. 2131-62. Filed September 3, 1963.

Petitioner, Howe A. Stidger, was a Captain in the United States Marine Corps during the taxable year 1958. On October 1, 1957, he was assigned to duty in the Far East. His wife and two children remained in California as they were prohibited by Marine Corps orders from accompanying petitioner or establishing a home in the Far East. During 1958 petitioner deceived a housing and subsistence allowance of approximately $145 per month and, in addition, an allowance for lodging while stationed at Iwakuni, Japan. While in the Far East, except for 49 days when petitioner was on travel status, petitioner had to furnish his own meals which cost him $650. *Held*, no part of the $650 is deductible under sections 62 (2) (B) and 162 (a) (2), I.R.C. 1954, as traveling expenses while away from home in the pursuit of a trade or business. *Howe A. Stidger, pro se.*

Arthur P. Generaux, Jr., for the respondent.

FINDINGS OF FACT AND OPINION—September 3, 1963

[fol. 64] ARUNDELL, *Judge:* Respondent determined a deficiency in income tax for the calendar year 1958 in the amount of $180.10.

The only issue is whether petitioner, Howe A. Stidger, is entitled to deduct, during 1958, as traveling expenses while away from home in pursuit of a trade or business, an amount of $650 for meals while stationed in the Far East.

FINDINGS OF FACT.

The stipulated facts are so found and are incorporated herein by this reference.

Petitioners, husband and wife, are individuals now residing in Sacramento, California. At the time they filed their petition they were presiding at Cherry Point, North Carolina. The joint return for the calendar year 1958 was filed with the district director of internal revenue at Greensboro, North Carolina. Petitioner, Howe A. Stidger, will hereinafter sometimes be referred to as petitioner.

Petitioner was a Captain in the United States Marine Corps during the taxable year 1958. He is now retired but prior to his retirement in July 1962 he had continually served as an active member of the Corps since 1942. Approximately two and one-half to three years preceding October 1, 1957, petitioner was attached to an air squadron stationed in El Toro in Southern California. On October 1, 1957, petitioner, together with his component, were assigned to duty in the Far East with the First [fol. 65] Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana) California.

Dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, in the Far East, were prohibited by Marine Corps orders to accompany said personnel or establish homes in the Far East.

During the entire year 1958 petitioner's wife and two children resided at Santa Ana, California.

Throughout the entire year 1958 petitioner received a housing allowance of approximately $102.50 per month and subsistence allowance of approximately $42.50 per month.

On October 1, 1957, petitioner departed from El Toro, California. Petitioner's itinerary from October 1957 to December 1958 was as follows:

Date	Place	Approximate No. of Days
1 Oct 57 to 20 Feb 58	Departed MCAS El Toro, Calif., traveled to, and duty at Iwakuni, Japan	142
21 Feb 58 to 7 Mar 58	Cubi Point, Philippine Islands	14
8 Mar 58 to 19 Apr 58	Iwakuni, Japan	42
20 Apr 58 to 23 May 58	Naha AFB, Okinawa	33
24 May 58 to 10 Aug 58	Iwakuni, Japan	78
11 Aug 58 to 29 Aug 58	Yokosuka, Japan	18
30 Aug 58 to 1 Sep 58	Iwakuni, Japan	2
2 Sep 58 to 19 Sep 58	San Diego, Calif.	17
20 Sep 58 to 25 Sep 58	Iwakuni, Japan	5
26 Sep 58 to 10 Oct 58	Naha AFB, Okinawa	14
11 Oct 58 to 14 Dec 58	Iwakuni, Japan	64
15 Dec 58 to 19 Dec 58	Travel to MCAS El Toro, Calif.	4

[fol. 66] Paragraph 9 of the stipulation is as follows:

> 9. During the year 1958, petitioner was placed in travel status for forty-nine days and, in addition to his normal housing and subsistence allowance, his expenses for meals and lodging were reimbursed. Petitioner does not claim travel expenses for the forty-nine days that he received reimbursement for the costs of meals and lodging.

Commissioned officers pay for their own meals at an official duty station; however, if they are on temporary assignment or in travel status, they are reimbursed for their meal expenses.

During the periods that petitioner was located at Iwakuni he received free lodging in addition to his housing and subsistence allowance but was not in travel status and he therefore did not receive free meals.

While in the Far East in 1958, except for the 49 days he was placed in travel status, petitioner had to pay for his own meals which cost him $650.

On the joint return for 1958 petitioner deducted the $650 he spent for meals. Respondent disallowed the deduction for the reason that "it has not been established that

the amount claimed constitutes an ordinary and necessary business expense."

Petitioner completed his tour of duty in the Far East in December 1958 and was thereafter assigned to duty at Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July 1962.

[fol.67] Ultimate Findings of Fact

During the taxable year 1958 petitioner's tax home was his military post of duty in the Far East. His stay there was indefinite, indeterminate, or permanent and not temporary.

OPINION

The issue is whether petitioner is entitled to deduct, under section 62 (2) (B) and 162 (a) (2), I.R.C. 1954,[1] the $650 he spent during 1958 for meals while stationed in the Far East. The corresponding provisions of the 1939 Code were sections 22 (n) (2) and 23 (a) (1) (A). In *Commissioner* v. *Flowers*, 326 U.S. 465, the United States Supreme Court declared that three conditions must be satisfied before a traveling expense deduction may be

---

[1] SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

* * * *

(2) Trade and business deductions of employees.—

* * * *

(B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

[fol. 68] allowed under section 23 (a) (1) (A) and that "Failure to satisfy any one of the three conditions destroys the traveling expense deduction." The three conditions were stated thus:

> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred "while away from home."
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

In the *Flowers* case the Supreme Court held that the taxpayer there did not satisfy the third condition. In the instant case we do not think petitioner has satisfied the second condition.

Petitioner contends that during 1958 his "home" was in Santa Ana, California, where his wife and children were residing and that, therefore, the expenses in question were incurred "while away from home." "Home" as used in the statute means the taxpayer's principal place of business, employment, or post or station at which he is employed. *Mort L. Bixler*, 5 B.T.A. 1181; *Raymond E. Kershner*, 14 T.C. 168, 174; *James R. Whitaker*, 24 T.C. 750; *O'Toole* v. *Commissioner*, 243 F. 2d 302 (C.A. 2, 1957), affirming *per curiam* a Memorandum Opinion of this Court. In the *O'Toole* case the Second Circuit said:

[fol. 69] Upon these facts the Tax Court found that petitioner's home, for the purpose of the statute, was at Long Beach where he was engaged in full time employment and that petitioner's maintaining another home at Laurelton was "immaterial." * * * This finding is clearly correct.

If, however, petitioner's place of employment may be said to be temporary as distinguished from indefinite, indeterminate or permanent, a deduction for traveling expenses while away from home may be allowed. *Harry F. Schurer*, 3 T.C. 544; *E. G. Leach* 12 T. C. 20. Cf. *Beatrice H. Albert*, 13 T.C. 129. In *Leo C. Cockrell*, 38 T.C. 470, 479, on appeal to C.A. 8, we said:

> This Court and other courts have allowed a deduction for expenditures for travel including meals and lodging when a taxpayer's employment at the place where such expenditures are made is temporary as contrasted with indefinite or indeterminate. *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61 (1958), and cases there cited. What constitutes "temporary" as distinguished from "indefinite" is a question of fact.
> * * *

Although petitioner's tour of duty in the Far East was for a period of approximately 15 months, we do not think it can be said to be a temporary assignment. While 15 months may have lacked real permanence, "the mere absence of permanence does not necessarily imply that degree of temporariness which would allow deductibility of traveling expenses." *Floyd Garlock*, 34 T.C. 611, 616. Cf. *Beatrice H. Albert*, *supra*. We have found as an ultimate fact that petitioner's stay in the Far East was not temporary.

[fol. 70] We think the facts in the instant case are very much like the facts in *Bercaw* v. *Commissioner*, 165 F. 2d 521 (C.A. 4, 1948), affirming a Memorandum Opinion of this Court; and *James R. Whitaker*, *supra*. See also Rev. Rul. 55-571, 1955-2 C.B. 44.

In *Bercaw* the taxpayer was an Army Captain who was stationed in Fort Meade, Maryland. He claimed a deduction for money spent for meals at Fort Meade and for weekend trips to his home in Virginia. We disallowed the claimed deduction. In affirming our holding, the Fourth Circuit, among other things, said:

> The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he

> would have received a per diem travel allowance which would not have been taxable. Jones v. United States, 60 Ct. Cl. 552. But whenever he made a permanent change of station that place of duty became his place of business and there was his "home" within the meaning of Section 23 (a) (1) (A). See Commissioner v. Flowers, 326 U.S. 465, 66 S.Ct. 250, 90 L.Ed. 203; Barnhill v. Commissioner, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210. Thus the expenditures for meals and striker service while at this post were personal living expenses and non-deductible * * *. This conclusion is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation.

In *James R. Whitaker, supra*, the taxpayer was a civil engineer residing at Hawarden, Iowa, where he maintained a home for himself and his family. In February 1951 he commenced work as an assistant project engineer for North Atlantic Constructors, a joint venture operating under a contract with the Department of Army for the [fol. 71] performance of certain off-shore construction in the general vicinity of Thule, Greenland. The exact location of the job site was a military secret. He was in Thule from December 15, 1951, to January 5, 1952; from April 8, 1952, to August 12, 1952; and from August 29, 1952, to November 26, 1952. The taxpayer's family was not permitted to accompany him to Greenland. Whenever he left Greenland he was reimbursed for traveling expenses incurred with the exception of one trip. In his 1952 income tax return the taxpayer claimed board and lodging expenses while at Thule, Greenland. He spent a total of 222 days in Thule during the taxable year 1952. In disallowing the claimed deduction, we said:

> Here, although petitioner contends Thule was not his main post of duty or principal place of business, we think the facts call for the ultimate finding that it was. The fact that petitioner was not permitted to take his family to Thule, so that he had no choice in the matter, does not help petitioner. * * *

The facts in the instant case are distinguishable from those in *Laurence P. Dowd*, 37 T.C. 399, relied upon by petitioner, in that the evidentiary facts in *Dowd* showed that Dowd's employment in Japan during 1956 and 1957 was temporary as contrasted with indefinite, indeterminate, or permanent.

We hold petitioner is not entitled to deduct the $650 spent for meals during the taxable year 1958.

Decision will be entered for the respondent.

[fol. 72]

BEFORE THE TAX COURT OF THE UNITED STATES

WASHINGTON

Docket No. 2131-62.

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DECISION—September 3, 1963

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion filed September 3, 1963, it is

ORDERED AND DECIDED: There is a deficiency in income tax for the calendar year 1958 in the amount of $180.10.

* * * * *

[fol. 73]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 2131-62

[File Endorsement Omitted]

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

NOTICE OF APPEAL—Filed December 4, 1963

The above named petitioners hereby appeal from the adverse decision of the United States Tax Court in its decision entered September 3, 1963, to the United States Court of Appeals for the Ninth Circuit.

If the Circuit Court of Appeals allows appellant review as requested by your petitioner, such additional supplementary pleadings and other documentary materials as are allowed by law, shall be forthcoming.

The Clerk of the Court is requested to prepare the record for review and notify petitioner of the costs and charges.

Dated, December 2, 1963.

/s/ Howe A. Stidger
Petitioner

/s/ Betty M. Stidger
Petitioner

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(SEAL)

Docket No. 2131-62

Tax Court of the United States, Filed Dec. 4, 1963.

HOWE A. STIDGER AND BETTY M. STIDGER,
PETITIONER ON REVIEW

vs.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT ON REVIEW

NOTICE OF FILING PETITION FOR REVIEW

TO: R. P. Hertzog
Acting Chief Counsel,
Internal Revenue Service.

You are hereby notified that the above-named petitioners(s) on December 4, 1963, filed with the Clerk of the Tax Court of the United States, at Washington, D.C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of the Tax Court entered in the above-entitled case(s).

Copy of the indicated document(s) as filed is hereto attached and served upon you.

/s/ Howard P. Locke
Clerk of the Court
Tax Court of the United States.

Dated: December 4, 1963

Service of copy of Petition for Review acknowledged.

Dated: December 4, 1963

/s/ R. P. Hertzog CPD
Acting Chief Counsel.
Internal Revenue Service,
Attorney for Respondent.

[fol. 78]

BEFORE THE TAX COURT OF THE UNITED STATES

WASHINGTON

Docket No. 2131-62

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER ENLARGING TIME—December 30, 1963

For cause, it is

ORDERED: That the time for filing the record on review in the United States Court of Appeals for the Ninth Circuit is extended to March 3, 1964.

/s/ Norman O. Tietjens
Judge.

Dated: Washington, D.C.
December 30, 1963

SERVED DEC. 30, 1963

[fol. 79]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * *

[fol. 80]

* * * *

Before: MERRILL, BROWNING & ELY, Circuit Judges

MINUTE ENTRY OF ORDER OF SUBMISSION—November 12, 1965

This cause coming on for hearing, Howe A. Stidger, in propria persona, argued for the petitioners, and Michel Cavanaugh, Attorney, Internal Revenue Service, argued for the respondent, thereupon the Court ORDERED the cause submitted for consideration and decision.

[fol. 81]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * *

Before: MERRILL, BROWNING and ELY, Circuit Judges

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT—December 27, 1965

ORDERED that the typewritten opinions this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the majority opinions rendered.

[fol. 82]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,630

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

OPINION—December 27, 1965

On Petition to Review a Decision of The Tax Court of the United States

Before: MERRILL, BROWNING and ELY, Circuit Judges

PER CURIAM: [1]

This is another of those troublesome cases involving the question whether certain travel expenses incurred by a taxpayer were incurred while "away from home" and are deductible for federal income tax purposes under section 162 of the Internal Revenue Code of 1954. At the time the deduction involved here was claimed, section 162 read in pertinent parts: [2]

"(a) In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid [fol. 83] or incurred during the taxable year in carrying on any trade or business including * * *

---

[1] This opinion was written by Judge William E. Orr. Following Judge Orr's death on October 7, 1965, Judge Browning was assigned to the panel and the case was reargued. The majority of the court as now constituted adopts Judge Orr's opinion as its own.

[2] Section 162(a)(2) was amended in 1962 by striking out "(including the entire amount expended for meals and lodging)" and inserting in lieu thereof "(including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)." Revenue Act of 1962, § 4(b), CCH Stand.Fed.Tax Rep. 85, 100 (extra ed. No. 44). This amendment is not involved in the case before us.

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *"

The facts, found by the Tax Court as stipulated, are substantially as follows. During the taxable year 1958 taxpayer was a captain in the United States Marine Corps. For approximately two and one half years prior to October 1, 1957, he had been attached to an air squadron stationed in El Toro in Southern California. On October 1, 1957, taxpayer, together with his component, was assigned to duty in the Far East with the First Marine Aircraft Wing, a part of the Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana) California. It was impossible for taxpayer to be accompanied abroad by his family because Marine Corps orders prohibited dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, from accompanying such personnel or establishing homes in the Far East. During taxpayer's entire tour abroad his wife and two children remained at the family's established home in Santa Ana, California.

Commissioned officers pay for their own meals at an official duty station unless they are considered to be on a temporary assignment or in travel status, in which cases they are reimbursed for their meal expenses. Taxpayer's principal duty station while in the Far East was Iwakuni, Japan. While at Iwakuni he received free lodging; but as he was not considered to be on travel status while there, he did not receive free meals. During 1958, except for forty-nine days during which he was placed on travel status while absent from Iwakuni and reimbursed for travel expenses, taxpayer had to pay for his own meals at a cost to him of $650.

On his joint return for 1958 taxpayer deducted the $650 as a travel expense incurred while away from home. The Commissioner disallowed the deduction and claimed a deficiency. Taxpayer petitioned the Tax Court for a redetermination of the alleged deficiency, and the Tax Court found as ultimate facts that during the taxable

[fol. 84] year taxpayer's "tax home" was his military post of duty in the Far East, and that his stay there was "indefinite, indeterminate, or permanent and not temporary." Accordingly, the Tax Court found that the expenses in question were not incurred while traveling "away from home" within the meaning of section 162(a)(2) and therefore were not deductible. On appeal from the decision of the Tax Court, we are faced squarely with the question of the meaning of "home" within section 162(a)(2).

Examination of the legislative history surrounding the introduction of the phrase "away from home" into the Revenue Act of 1921 is inconclusive as to Congressional intent regarding the meaning of "home." As early as 1927, however, the Board of Tax Appeals held that the precursor of section 162(a)(2) was intended to permit a deduction for traveling expenses only if the expenses were incurred while the taxpayer was away from his "post of duty" or place of employment. *Mort L. Bixler*, 5 B.T.A. 1181 (1927). The word "home" thus became a term of art with a meaning different from its normal usage as residence, domicile or dwelling place; and the "tax home" doctrine was established.

Since the Tax Court's decision in the *Bixler* case the Commissioner has consistently maintained that "home" in the statute means "tax home" and that one's tax home is one's "home post" or place of employment. This construction has been accepted by a number of courts. See *Barnhill* v. *Commissioner*, 148 F.2d 913 (4th Cir. 1945); *O'Toole* v. *Commissioner*, 243 F.2d 302 (2nd Cir. 1957).

In *Wallace* v. *Commissioner*, 144 F.2d 407 (9th Cir. 1944), however, this court rejected the "tax home" doctrine and held that the traveling expenses of a taxpayer who regularly lived in San Francisco but visited Los Angeles on business met the statutory requirement that traveling expenses be incurred while away from home. In *Wallace* we unequivocally stated that "home" as used in the statute should be given its ordinary and usual meaning. *Wallace* v. *Commissioner*, *supra*, at 410.

A chance to resolve a conflict among the circuit courts as to the meaning of "home" to which our opinion in *Wallace* contributed came before the Supreme Court in

[fol. 85] *Flowers* v. *Commissioner*, 326 U.S. 465 (1946); in considering the travel expense deduction the court set out three requirements, each of which had to be met before the deduction would be allowed.

> "(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred 'while away from home,'
>
> (3) The expense must be incurred in pursuit of business * * *."

The court noted the division of opinion regarding the meaning of "home" in the circuit courts but found it unnecessary to reconcile because in its view of the case the expenses involved did not meet the third requirement of being incurred in pursuit of business. *Flowers* thus avoided rather than settled the "home" controversy.

Strictly applied, the "tax home" doctrine would greatly restrict the travel expense deduction; and the Tax Court soon recognized an exception to it in cases where the taxpayer's employment away from home could be considered "temporary." *Chester D. Griesemer*, 10 B.T.A. 386 (1928); *Walter F. Brown*, 13 B.T.A. 832 (1928); accord *Coburn* v. *Commissioner*, 138 F.2d 763 (2nd Cir. 1943). However, where the employment away from home was of indefinite or indeterminate duration, the deduction was denied. *Willard S. Jones*, 13 T.C. 880 (1949). The Commissioner accepted the "temporary-indefinite" distinction and recognized "temporary" employment as an exception to the rule that "home" equals place of employment. I.R.S. Pub. No. 300, 5 CCH 1956 Stand.Fed.Tax Rep. para. 6347; Rev.Rul. 189, 1960-1 Cum.Bull. 60, 65.

The Supreme Court had a second opportunity to clarify the "home" controversy when the question of the scope of the "temporary" employment exception came before it in *Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958). In *Peurifoy* three construction workers claimed deduction for living expenses incurred while living for periods of from

eight to twenty months at construction sites some distance from their permanent residences. The Tax Court allowed the deductions on the ground that the employment away [fol. 86] from home was "temporary." The Fourth Circuit assumed without deciding that the temporary employment exception was valid and that it applied to the "exigencies of the business" requirement as well as the "away from home" requirement set out in *Flowers* v. *Commissioner, supra.* The court then reversed because the taxpayers had not met their burden of proof of showing their employment was temporary and not indefinite.

Upon review on writ of certiorari the Supreme Court made the same assumptions and stated:

> "Generally, a taxpayer is entitled to deduct unreimbursed travel expenses * * * only when they are required by the exigencies of business * * *.
>
> To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case where the taxpayer's employment is 'temporary' as contrasted with 'indefinite' or 'indeterminate.' * * * The respondent does not in the present case challenge the validity of this exception to the general rule."

The Commissioner contends that in *Peurifoy* the Supreme Court approved the temporary employment concept as an exception to its rule in *Flowers* v. *Commissioner, supra,* and that, therefore, a post of indefinite or indeterminate employment necessarily becomes the taxpayer's "tax home." It is clear from the language quoted above, however, that the validity of the temporary employment exception was assumed without decision by the Supreme Court in *Peurifoy* because the court did not consider that a challenge to the exception was before it. The court affirmed on the ground that it would not disturb the circuit court's factual assessment that the employment involved was not temporary. And for the second time the Supreme Court specifically avoided a definition of the word "home."

This was our position in *Harvey* v. *Commissioner,* 283 F.2d 491 (9th Cir. 1960), when we stated:

> "Peurifoy, then, does not establish the rule, as suggested by the Commissioner, that the place where a taxpayer is employed for an 'indefinite' period, is *necessarily* his tax home."

[fol. 87] In *Harvey* the taxpayer maintained his home in Santa Monica, California, where he worked for the Douglas Aircraft Company. From Santa Monica he was transferred on temporary assignment to Edwards Air Force Base, 117 miles away. Taxpayer's tour of duty at Edwards was to be for an indeterminate length of time; he knew only that he would work there as long as he was needed, a period which in the circumstances of his job could be expected to last from a few months to two years. In fact, he remained thirteen months.

The Tax Court found Edwards to be the taxpayer's home during the taxable year in question on the ground that his term of employment there was "indefinite." We concluded that when the term "indefinite" was used as the Tax Court used it, the test applied became a mechanical one, incapable of effectuating the purpose of the deduction provision; and we formulated a more flexible test:

> "An employee might be said to change his tax home if there is a reasonable probability *known to him* that he may be employed for a long period of time at his new station. What constitutes 'a long period of time' varies with circumstances surrounding each case. If such be the case, it is reasonable to expect him to move his permanent abode to his new station, and thus avoid the double burden that the Congress intended to mitigate. On the other hand, if it is very likely that taxpayer's stay away from home will be short, then it seems quite unreasonable to expect him to move his domicile, even though it cannot be said that his employment will terminate 'within a fixed or reasonably short period,' to use the words of the Tax Court."

In drawing the distinction between long and short periods of employment we did not reject the distinctions which had been drawn by other courts, but we did reject the inflexible manner in which the distinction had been em-

ployed by the Commissioner and the Tax Court. We used the length of employment away from one's established home as a factor in determining what we considered to be the fundamental question in these travel expense cases—is it reasonable to expect the taxpayer to move his residence to his place of employment. Applying this test to [fol. 88] the facts of the *Harvey* case, we held that the taxpayer could not reasonably have been expected to move his residence, and the deduction was allowed.[3]

In *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962), we again looked to whether it would be reasonable to expect the particular taxpayer to move his home nearer to the place where he was working in determining the deductibility of claimed travel expenses. In *Wright* the taxpayer commuted daily from his residence in Pocatello, Idaho, to work at Atomic Energy Commission research sites seventy miles away in an inhospitable desert area remote from any town or place of habitation. We held that a taxpayer's inability to maintain a home in the usual sense at his place of employment was a valid reason for allowing the deduction as travel expenses of the resulting costs of transportation, food and lodging. We concluded, however, that the taxpayer had a duty to mitigate his expenses by moving as near to the job site as is reasonable. The deduction in *Wright* was accordingly measured with reference to the nearest habitable community to the employment site, the town of Arco, Idaho. As Arco was neither the taxpayer's actual residence nor his place of employment, our decision in *Wright* necessarily proceeded upon the basis that "home" as used in the statute means residence, with the qualification that the taxpayer should establish his residence as near to his place of employment as is reasonable.

The Commissioner has argued that rejection of the "tax home" doctrine will result in the deductibility of nondeductible commuting and other personal expenses. We

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[3] In *Harvey* v. *Commissioner* both the taxpayer and the Commissioner had stipulated that "home" meant "home post" or place of employment and not place of abode. The meaning of "home" as such was, therefore, not before us; and we inquired only into the application of the distinction between temporary and indefinite employment.

think, however, that the words of section 162 limiting deductions to "ordinary and necessary" expenses stand to prevent such a result. It has been clear since the Supreme Court's decision in *Flowers* v. *Commissioner* that "the exigencies of business rather than the personal conveniences and necessities of [this taxpayer] must be the motivating factors." *Flowers* v. *Commissioner, supra.*

[fol. 89] By placing the emphasis on the "ordinary and necessary" requirement of the statute, there is no necessity for attributing any special "tax sense" to the word "home." Both the Commissioner's distinction between temporary and indefinite employment and the "exigencies of business" test as set out in *Flowers* v. *Commissioner* look to the duration of employment as a principal factor in separating deductible business expenses from nondeductible personal expenses. The "exigencies of business" test follows directly and naturally from the "ordinary and necessary" requirement of the statute itself. The temporary-indefinite distinction on the other hand, introduces into the statute an extraneous concept formulated in the first place only to provide an exception to the Commissioner's strained rule that "home" equals place of employment. Neither the rule nor its exception are necessary and both obscure the fundamental question of whether expenses claimed as travel expenses under section 162 are ordinary and necessary business expenses. Deductibility under the statute need not turn on fictions and inflexible rules of thumb. By looking to the ordinary and necessary requirement of the statute the end result will in most cases be substantially the same, and the unfairness inherent in a strict application of the "tax home" doctrine will be avoided.

"Home" in the statute, then, means home in its ordinary and usual sense, as we stated long ago in *Wallace* v. *Commissioner*. The length of time a taxpayer is employed away from that home does not itself give the answer, but is a factor in determining the answer to the question whether the taxpayer could reasonably be expected to have moved his home. If it appears reasonable to have expected the taxpayer to move closer to his place of employment, then expenses claimed as travel expenses cannot be said to be "ordinary and necessary." On the other

hand, if such a move appears unreasonable, the ordinary and necessary requirement is met, and the deduction will be allowed.

We turn now to the particular facts of the case before us. Taxpayer's duty station in the Far East was dictated by military orders. Marine Corps orders also prohibited him from establishing a home for his dependents in the Far East. There is no question here as to whether it was reasonable for taxpayer to have moved his home. He had no choice but to maintain a separate residence for his [fol. 90] family.[4] Accordingly, we hold that taxpayer's travel expenses while away from home during the taxable year in question were "ordinary and necessary" expenses and are deductible under section 162.

The Commissioner appears to be making the final argument in this case that taxpayer is not entitled to a deduction for the meal expenses because he has failed to show that he would not have been obliged to pay an equal amount for meals at his home post in the United States. The statute, however, specifically provides that "traveling expenses, (including the *entire* amount expended for meals and lodging)" is deductible. (Emphasis added.) We have determined the expenses claimed to have been ordinary and necessary. Taxpayer need make no further showing.

The judgment is reversed.

ELY, Circuit Judge, Dissenting:

I dissent. With our late Brother Orr, one of the noblest of men, I discussed my opposing views, and he, without doubt, would have expected and encouraged me to record them.

When the Marine Corps transferred the taxpayer to his post of duty in Japan, the assignment was for a period of fifteen months. The period was subject to extension by orders of the Marine Corps. As the majority points out,

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[4] Taxpayer's position is similar to that of the public official who must maintain his home elsewhere than his official place of employment. In such cases the travel expense deduction has been granted. *United States* v. *Le Blanc*, 278 F.2d 571 (5th Cir. 1960); *Moss* v. *United States*, 145 F.Supp. 10 (W.D.S.C. 1956); *Emmert* v. *United States*, 146 F.Supp. 322 (S.D.Ind. 1955).

there were forty-nine days during taxpayer's fourteen and one-half months of service in Japan when he was away from his station on temporary duty, placed in "travel status", and reimbursed for his expenses. For the remainder of the period of overseas duty, approximately thirteen months, the taxpayer received from the Government, in addition to his lodging, a tax-exempt payment of approximately $145 per month as a quarters and subsistence allowance. Notwithstanding the fact that the allowance for subsistence was $42.50 per month, the majority upholds the taxpayer's claim that the *entire* cost of his [fol. 91] meals during the approximate thirteen-month period is a tax-deductible expense allowance. In so doing, the majority cast our circuit into direct conflict with Revenue Ruling 55-571, 1955-2 Cum. Bull. 44,[1] and with the decision of the Fourth Circuit in *Bercaw* v. *Commissioner*, 165 F. 2d 521 (1948), wherein the Court wrote,

> "The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem travel allowance . . . . Thus the expenditures for meals and striker service while at this post were personal living expenses and non-deductible . . . . This conclusion is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation."

165 F.2d at 524. (Citations omitted.) See also *James R. Whitaker*, 24 T.C. 750 (1955).

Regardless of whether or not the taxpayer was "away from home" within the meaning of that language as it is used in section 162(a)(2), the only expenses which are deductible under the section are "traveling expenses". *Commissioner* v. *Flowers*, 326 U.S. 465, 90 L. Ed. 203, 66 Sup. Ct. 250 (1946). "The expense must be a reasona-

[1] "members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling 'away from home' and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them."

ble and necessary *traveling* expense, as that term is generally understood." 326 U.S. 470. (Emphasis added.) It should follow that the question is not whether the taxpayer was "away from home", but whether during the period for which the expense is claimed he was actually "traveling". The Tax Court has determined that he was not, and our duty is to sustain the finding absent demonstration by the taxpayer that the finding was clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, 4 L. Ed. 2d 1218, 80 Sup. Ct. 1190 (1960); *Truck Ter-*
[fol. 92] *minals, Inc.* v. *Commissioner*, 314 F.2d 449, 455 (9th Cir. 1963); *Young* v. *Commissioner*, 268 F.2d 245 (9th Cir. 1959).

A factual determination of the Tax Court, supported by substantial evidence, should not, on review, be set aside as "clearly erroneous", unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Commissioner* v. *Dubersten, supra* at 291, quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 Sup. Ct. 525 (1948), and, in my opinion, the whole body of evidence clearly supports the Tax Court's finding. In the first place, the period of time for which the taxpayer was assigned to his Japanese post made of that post his "permanent" station in a military sense. In making provisions for "travel and transportation allowances . . . upon a *change* of *permanent* station" (37 U.S.C. § 404(a). (Emphasis added.)), the Congress has recognized that a soldier's "permanent station", being subject to "change", is never permanent in an enduring sense. In the present case, however, the period of assignment, fifteen months with possibility of extension, was factually determined to be an "indefinite" period rather than a "temporary" period, and this should be an important, if not a controlling, consideration. *Puerifoy* v. *Commissioner*, 358 U.S. 59, 3 L. Ed. 2d 30, 79 Sup. Ct. 104 (1958). In the second place, the Marine Corps itself determined that the taxpayer, during his fourteen and one-half months in Japan, was not in "travel status" except for the forty-nine days when he was temporarily detached to locations comparatively short distances from his "permanent" Japanese post. If it be conceded that the

Marine Corps' determination should not be conclusive, it nevertheless constitutes strong support for the Tax Court's factual decision. *William W. Todd*, 10 T.C. 655 (1948). See also *Allan Cunningham*, 22 T.C. 906 (1954).

The Congress has undertaken to assure that military men who serve our country overseas shall not suffer undue financial loss. It is provided that the Secretaries of the uniformed services may authorize payment to overseas military personnel of per diem allowances related to the cost of living, "including a cost of . . . subsistence", and such allowance is authorized to be made to the soldier "whether or not he is in a travel status". 37 U.S.C. § 405, revising in 1962 without substantial change The [fol. 93] Career Compensation Act of 1949, ch. 681, § 303 (b), 63 Stat. 813. From these provisions I see an intent on the part of Congress that the soldier assigned to overseas duty shall not sustain significant financial loss and that any such loss shall be prevented by the direct payment of travel expenses and increased allowances rather than by tax deduction which might properly be claimed by others for whom no specific increased benefits are provided.[2]

I would affirm the Tax Court.

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[2] I do not believe that in the selection of qualified military personnel for overseas duty, the Department of Defense should be invited to concern itself with increased cost to the Government depending upon whether one soldier is "away from home" and another soldier, with a different family status, is not.

In the so-called "Cuban crisis" of recent years, we read that the dependents of our military personnel stationed at Guantanamo Bay were removed to the United States. Would the majority say that those servicemen, immediately upon the transfer of their dependents, became "away from home" and commenced to "travel"?

It is anomalous and discriminatory that our servicemen now engaged in Vietnam are entitled, under the majority opinion, to a more favorable tax treatment in our circuit than are those who, while doubtless fighting with equal valor, are denied deductions for their "traveling" expenses in the Fourth Circuit and, apparently, in the Sixth Circuit also. See *Commissioner* v. *Motch*, 180 F.2d 859 (6th Cir. 1950), wherein the court wrote, at 861,

> "'[An armed services officer] is limited in his personal expenditures chargeable to the government, or taxwise deductible, to the usual stipends fixed under approprite regulations adopted in pursuance of Acts of Congress for his subsistence and travel expenses."

[fol. 94]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,630

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT—December 27, 1965

Upon Petition to Review a Decision of The Tax Court of the United States,.....

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, ...

and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the.....Decision of the said Tax Court of the United States in this Cause be, and hereby is reversed.

Filed and entered December 27, 1965

[fol. 95]

[Clerk's Certificate Omitted in Printing]

[fol. 96]

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1965

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

HOWE A. STIDGER, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 29, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 26, 1966.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 29th day of March 1966

[fol. 97]

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1965

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs

HOWE A. STIDGER AND BETTY M. STIDGER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—April 25, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including May 26, 1966

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 25th day of April, 1966

[fol. 98]

SUPREME COURT OF THE UNITED STATES

No. 173, October Term, 1966

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

HOWE A. STIDGER, ET UX

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOWE A. STIDGER and BETTY M. STIDGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Tax Court (Appendix, *infra*, pp. 8–15) is reported at 40 T.C. 896. The opinion of the court of appeals (Appendix, *infra*, pp. 16–30) is reported at 355 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1965. (Appendix, *infra*, p. 31.) By orders of Mr. Justice Douglas the time for filing a petition for a writ of certiorari was extended to and including May 26, 1966.

218-855—66——1

QUESTION PRESENTED

Whether amounts expended for meals by a military officer stationed at a permanent duty post to which he is prohibited from bringing his family constitute deductible "traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business" or non-deductible "personal" or "living" expenses, under the pertinent provisions of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 162. Trade or Business Expenses.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;

(26 U.S.C. (1958 ed.) 162.)

SEC. 262. Personal, Living, and Family Expenses.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. (1958 ed.) 262.)

STATEMENT

Respondent,[1] now retired, was, during 1957 and 1958, a captain in the United States Marine Corps. For approximately 2½ years preceding October, 1957, he had been attached to a Marine air squadron stationed at El Toro, California. During this period he lived with his family in nearby Santa Ana. On October 1, 1957, respondent, together with his component, was assigned to a new permanent duty station in the Far East with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, for 15 months. On that date respondent departed from El Toro, California for Iwakuni, Japan. Dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, were prohibited by Marine Corps orders from accompanying such personnel to the Far East. Accordingly, during respondent's 15 month tour of duty abroad, his family continued to reside in Santa Ana, California. While stationed at Iwakuni, the Marine Corps furnished respondent free quarters. Like all commissioned officers, he was, however, required to pay for his own meals, which the Marine Corps supplied for approximately $2.00 per day.[2] Moreover, respondent also received $145 per month as a non-taxable housing and subsistence allowance for himself and his family. In December, 1958, re-

[1] Mrs. Stidger is a party solely because a joint return was filed for 1958. We refer to Mr. Stidger as respondent.

[2] During the brief periods that respondent was away from Iwakuni on official business he was classified as on temporary assignment or in travel status away from his permanent duty station and was reimbursed for the cost of his meals.

spondent was assigned to a new permanent duty station at the Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July, 1962. (Appendix, *infra*, pp. 8–10, 17–18.)

On his 1958 return respondent deducted the $650 he had spent for meals at Iwakuni, Japan. The Commissioner disallowed the deduction. The Tax Court found that respondent's stay at Iwakuni was "not temporary," and that during 1958 his "home" within the meaning of Code § 162(a)(2) was his military post of duty in the Far East. Accordingly, the Tax Court decided that the expenses in question were not incurred while "traveling * * * away from home." (Appendix, *infra*, pp. 10–15.)

The court of appeals, one judge dissenting, reversed the Tax Court on the ground that respondent's "home" was his family residence in California, and that he was thus "away from home" while stationed at Iwakuni. (Appendix, *infra*, pp. 16–30.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Bercaw* v. *Commissioner*, 165 F. 2d 521. In that case the taxpayer was an Army officer who served at Fort Meade, Maryland, during 1941. Since no quarters were available at Fort Meade to house his family, they lived about 160 miles away in Virginia. The Army furnished quarters for the taxpayer at Fort Meade, and he ate in an officers' mess which cost $1.25 per day. The Army also paid him non-taxable monthly housing and subsistence allowances of $116. The taxpayer claimed that the cost of

his meals at Fort Meade was deductible under the predecessor to the statute here in question. Both the Tax Court and the Fourth Circuit denied the deduction on the ground that Fort Meade, his permanent duty station, constituted his "home" within the meaning of the statute and that he was thus not "traveling * * * away from home" while at Fort Meade.

The *Bercaw* case is similar to the instant case in all material respects. In both cases officers in the Armed Services were forced—either by orders or by the unavailability of housing—to live apart from their families. Both received free lodging at their permanent duty stations but were required to pay for their own meals (which were supplied by the military at a relatively low cost). Both received non-taxable monthly housing and subsistence allowances. Nevertheless, in *Bercaw* the Court of Appeals for the Fourth Circuit denied the claimed deduction whereas in the instant case the Court of Appeals for the Ninth Circuit allowed the deduction.

The issue presented by this case is important and continuing. We have been advised by the Defense Department that there are now approximately 25,000 commissioned officers serving overseas at permanent duty stations to which they cannot take their families.

2. The decision below is erroneous. Respondent manifestly was not away from *his* home while at Iwakuni, Japan. Iwakuni was designated as respondent's permanent duty station in October 1957, and with the exception of several brief assignments he lived and worked there for the next 15 months until

he was transferred to a new permanent duty station at Cherry Point, North Carolina. Regardless of whether his family was permitted to accompany him, his "home" for purposes of § 162(a)(2) was at Iwakuni where he lived and performed his regular duties.

Armed Services' officers are, throughout their careers, periodically transferred from one permanent duty post to another. They, therefore, must expect to be parted from their families at times. The government, however, has taken steps to insure that these separations do not impose any undue financial burden on such officers. They are furnished free housing during separations and their meals are supplied at a relatively low cost. They are given non-taxable housing and subsistence allowances for themselves and their families. When an officer is sent overseas to a place where his family cannot accompany him, the government will move his family to whatever domestic location he selects. Finally, military personnel are given a large number of tax advantages in addition to tax-free housing and subsistence allowances. See, *e.g.*, 1954 Code §§ 112, 113 (combat pay and mustering out payments).

In light of these factors, we do not believe that Congress meant § 162(a)(2) to give military officers a deduction for the cost of meals at their permanent duty stations where they regularly live and work. See Rev. Rul. 55–571, 1955–2 Cum. Bull. 44. Rather, we submit that, in such circumstances, the cost of an officer's meals constitutes a personal or living expense, which is specifically made non-deductible by § 262 of the Code.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General,

JACK S. LEVIN,
Assistant to the Solicitor General,

ROBERT N. ANDERSON,
MORTON K. ROTHSCHILD,
Attorneys,

MAY 1966.

APPENDIX

40 T.C. No. 97

Tax Court of the United States

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 2131–62. Filed September 3, 1963

ARUNDELL, *Judge:* Respondent determined a deficiency in income tax for the calendar year 1958 in the amount of $180.10.

The only issue is whether petitioner, Howe A. Stidger, is entitled to deduct, during 1958, as traveling expenses while away from home in pursuit of a trade or business, an amount of $650 for meals while stationed in the Far East.

FINDINGS OF FACT

The stipulated facts are so found and are incorporated herein by this reference.

Petitioners, husband and wife, are individuals now residing in Sacramento, California. At the time they filed their petition they were residing at Cherry Point, North Carolina. The joint return for the calendar year 1958 was filed with the district director of internal revenue at Greensboro, North Carolina. Petitioner, Howe A. Stidger, will hereinafter sometimes be referred to as petitioner.

Petitioner was a Captain in the United States Marine Corps during the taxable year 1958. He is now

retired but prior to his retirement in July 1962, he had continually served as an active member of the Corps since 1942. Approximately two and one-half to three years preceding October 1, 1957, petitioner was attached to an air squadron stationed in El Toro in Southern California. On October 1, 1957, petitioner, together with his component, were assigned to duty in the Far East with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana), California.

Dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, in the Far East, were prohibited by Marine Corps orders to accompany said personnel or establish homes in the Far East.

During the entire year 1958 petitioner's wife and two children resided at Santa Ana, California.

Throughout the entire year 1958 petitioner received a housing allowance of approximately $102.50 per month and subsistence allowance of approximately $42.50 per month.

On October 1, 1957, petitioner departed from El Toro, California. Petitioner's itinerary from October 1957 to December 1958 was as follows:

Date	Place	Approximate number of days
1 Oct 57 to 20 Feb 58	Departed MCAS El Toro, Calif., traveled to, and duty at Iwakuni, Japan	142
21 Feb 58 to 7 Mar 58	Cubi Point, Philippine Islands	14
8 Mar 58 to 19 Apr 58	Iwakuni, Japan	42
20 Apr 58 to 23 May 58	Naha AFB, Okinawa	33
24 May 58 to 10 Aug 58	Iwakuni, Japan	78
11 Aug 58 to 29 Aug 58	Yokosuka, Japan	18
30 Aug 58 to 1 Sep 58	Iwakuni, Japan	2
2 Sep 58 to 19 Sep 58	San Diego, Calif.	17
20 Sep 58 to 25 Sep 58	Iwakuni, Japan	5
26 Sep 58 to 10 Oct 58	Naha AFB, Okinawa	14
11 Oct 58 to 14 Dec 58	Iwakuni, Japan	64
15 Dec 58 to 19 Dec 58	Travel to MCAS El Toro, Calif.	4

Paragraph 9 of the stipulation is as follows:

> 9. During the year 1958, petitioner was placed in travel status for forty-nine days and, in addition to his normal housing and subsistence allowance, his expenses for meals and lodging were reimbursed. Petitioner does not claim travel expenses for the forty-nine days that he received reimbursement for the costs of meals and lodging.

Commissioned officers pay for their own meals at an official duty station; however, if they are on temporary assignment or in travel status, they are reimbursed for their meal expenses.

During the periods that petitioner was located at Iwakuni he received free lodging in addition to his housing and subsistence allowance but was not in travel status and he therefore did not receive free meals.

While in the Far East in 1958, except for the 49 days he was placed in travel status, petitioner had to pay for his own meals which cost him $650.

On the joint return for 1958 petitioner deducted the $650 he spent for meals. Respondent disallowed the deduction for the reason that "it has not been established that the amount claimed constitutes an ordinary and necessary business expense."

Petitioner completed his tour of duty in the Far East in December 1958 and was thereafter assigned to duty at Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July 1962.

ULTIMATE FINDING OF FACT

During the taxable year 1958 petitioner's tax home was his military post of duty in the Far East. His stay there was indefinite, indeterminate, or permanent and not temporary.

OPINION

The issue is whether petitioner is entitled to deduct, under sections 62(2)(B) and 162(a)(2), I.R.C. 1954,[1] the $650 he spent during 1958 for meals while stationed in the Far East. The corresponding provisions of the 1939 Code were sections 22(n)(2) and 23(a)(1)(A). In *Commissioner* v. *Flowers*, 326 U.S. 465, the United States Supreme Court declared that three conditions must be satisfied before a traveling expense deduction may be allowed under section 23(a)(1)(A) and that "Failure to satisfy any one of the three conditions destroys the traveling expense deduction." The three conditions were stated thus:

> (1) The expense must be a reasonable and necessary traveling expense, as that term is

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[1] SEC. 62. Adjusted Gross Income Defined.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

* * * * *

"(2) Trade and business deductions of employees.—"

* * * * *

"(B) Expenses for travel away from home.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee."

SEC. 162. Trade or Business Expenses.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * *

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *"

generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

In the *Flowers* case the Supreme Court held that the taxpayer there did not satisfy the third condition. In the instant case we do not think petitioner has satisfied the second condition.

Petitioner contends that during 1958 his "home" was in Santa Ana, California, where his wife and children were residing and that, therefore, the expenses in question were incurred "while away from home." "Home" as used in the statute means the taxpayer's principal place of business, employment, or post or station at which he is employed. *Mort L. Bixler*, 5 B.T.A. 1181; *Raymond E. Kershner*, 14 T.C. 168, 174; *James R. Whitaker*, 24 T.C. 750; *O'Toole* v. *Commissioner*, 243 F. 2d 302 (C.A. 2, 1957), affirming *per curiam* a Memorandum Opinion of this Court. In the *O'Toole* case the Second Circuit said:

> Upon these facts the Tax Court found that petitioner's home, for the purpose of the statute, was at Long Beach where he was engaged in full time employment and that petitioner's maintaining another home at Laurelton was "immaterial." * * * This finding is clearly correct.

If, however, petitioner's place of employment may be said to be temporary as distinguished from indefinite, indeterminate or permanent, a deduction for traveling expenses while away from home may be allowed. *Harry F. Schurer,* 3 T.C. 544; *E. G. Leach,* 12 T.C. 20. Cf. *Beatrice H. Albert,* 13 T.C. 129. In *Leo C. Cockrell,* 38 T.C. 470, 479, on appeal to C.A. 8, we said:

> This Court and other courts have allowed a deduction for expenditures for travel including meals and lodging when a taxpayer's employment at the place where such expenditures are made is temporary as contrasted with indefinite or indeterminate. *Peurifoy* v. *Commissioner,* 358 U.S. 59, 61 (1958), and cases there cited. What constitutes "temporary" as distinguished from "indefinite" is a question of fact. * * *.

Although petitioner's tour of duty in the Far East was for a period of approximately 15 months, we do not think it can be said to be a temporary assignment. While 15 months may have lacked real permanence, "the mere absence of permanence does not necessarily imply that degree of temporariness which would allow deductibility of traveling expenses." *Floyd Garlock,* 34 T.C. 611, 616. Cf. *Beatrice H. Albert, supra.* We have found as an ultimate fact that petitioner's stay in the Far East was not temporary.

We think the facts in the instant case are very much like the facts in *Bercaw* v. *Commissioner,* 165 F. 2d 521 (C.A. 4, 1948), affirming a Memorandum Opinion of this Court; and *James R. Whitaker, supra.* See also Rev. Rul. 55–571, 1955–2 C.B. 44.

In *Bercaw* the taxpayer was an Army Captain who was stationed in Fort Meade, Maryland. He claimed a deduction for money spent for meals at Fort Meade

and for weekend trips to his home in Virginia. We disallowed the claimed deduction. In affirming our holding, the Fourth Circuit, among other things, said:

> The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem travel allowance which would not have been taxable. *Jones* v. *United States*, 60 Ct. Cl. 552. But whenever he made a permanent change of station that place of duty became his place of business and there was his "home" within the meaning of Section 23(a)(1)(A). See *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203; *Barnhill* v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210. Thus the expenditures for meals and striker service while at this post were personal living expenses and non-deductible * * *. This conclusion is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation.

In *James R. Whitaker, supra*, the taxpayer was a civil engineer residing at Hawarden, Iowa, where he maintained a home for himself and his family. In February 1951 he commenced work as an assistant project engineer for North Atlantic Constructors, a joint venture operating under a contract with the Department of Army for the performance of certain off-shore construction in the general vicinity of Thule, Greenland. The exact location of the job site was a military secret. He was in Thule from December 15, 1951, to January 5, 1952; from April 8, 1952, to August 12, 1952; and from August 29, 1952, to No-

vember 26, 1952. The taxpayer's family was not permitted to accompany him to Greenland. Whenever he left Greenland he was reimbursed for traveling expenses incurred with the exception of one trip. In his 1952 income tax return the taxpayer claimed board and lodging expenses while at Thule, Greenland. He spent a total of 222 days in Thule during the taxable year 1952. In disallowing the claimed deduction, we said:

> Here, although petitioner contends Thule was not his main post of duty or principal place of business, we think the facts call for the ultimate finding that it was. The fact that petitioner was not permitted to take his family to Thule so that he had no choice in the matter, does not help petitioner. * * *

The facts in the instant case are distinguishable from those in *Laurence P. Dowd,* 37 T.C. 399, relied upon by petitioner, in that the evidentiary facts in *Dowd* showed that Dowd's employment in Japan during 1956 and 1957 was temporary as contrasted with indefinite, indeterminate, or permanent.

We hold petitioner is not entitled to deduct the $650 spent for meals during the taxable year 1958.

Decision will be entered for the respondent.

United States Court of Appeals for the Ninth Circuit

No. 19630

HOWE A. STIDGER AND BETTY M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

[December 27, 1965]

On Petition To Review a Decision of The Tax Court of the United States

Before: MERRILL, BROWNING and ELY, Circuit Judges

PER CURIAM:[1]

This is another of those troublesome cases involving the question whether certain travel expenses incurred by a taxpayer were incurred while "away from home" and are deductible for federal income tax purposes under section 162 of the Internal Revenue Code of 1954. At the time the deduction involved here was claimed, section 162 read in pertinent parts.[2]

> "(a) In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year

[1] This opinion was written by Judge William E. Orr. Following Judge Orr's death on October 7, 1965, Judge Browning was assigned to the panel and the case was reargued. The majority of the court as now constituted adopts Judge Orr's opinion as its own.

[2] Section 162(a)(2) was amended in 1962 by striking out "(including the entire amount expended for meals and lodging)" and inserting in lieu thereof "(including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)." Revenue Act of 1962, § 4(b), CCH Stand. Fed. Tax Rep. 85, 100 (extra ed. No. 44). This amendment is not involved in the case before us.

in carrying on any trade or business, including * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *"

The facts, found by the Tax Court as stipulated, are substantially as follows. During the taxable year 1958 taxpayer was a captain in the United States Marine Corps. For approximately two and one half years prior to October 1, 1957, he had been attached to an air squadron stationed in El Toro in Southern California. On October 1, 1957, taxpayer, together with his component, was assigned to duty in the Far East with the First Marine Aircraft Wing, a part of the Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro (Santa Ana) California. It was impossible for taxpayer to be accompanied abroad by his family because Marine Corps orders prohibited dependents of personnel assigned to duty with the Aircraft Fleet Marine Force, Pacific, from accompanying such personnel or establishing homes in the Far East. During taxpayer's entire tour abroad his wife and two children remained at the family's established home in Santa Ana, California.

Commissioned officers pay for their own meals at an official duty station unless they are considered to be on a temporary assignment or in travel status, in which cases they are reimbursed for their meal expenses. Taxpayer's principal duty station while in the Far East was Iwakuni, Japan. While at Iwakuni he received free lodging; but as he was not considered to be on travel status while there, he did not receive free meals. During 1958, except for forty-nine days during which he was placed on travel status while

absent from Iwakuni and reimbursed for travel expenses, taxpayer had to pay for his own meals at a cost to him of $650.

On his joint return for 1958 taxpayer deducted the $650 as a travel expense incurred while away from home. The Commissioner disallowed the deduction and claimed a deficiency. Taxpayer petitioned the Tax Court for a redetermination of the alleged deficiency, and the Tax Court found as ultimate facts that during the taxable year taxpayer's "tax home" was his military post of duty in the Far East, and that his stay there was "indefinite, indeterminate, or permanent and not temporary." Accordingly, the Tax Court found that the expenses in question were not incurred while traveling "away from home" within the meaning of section 162(a)(2) and therefore were not deductible. On appeal from the decision of the Tax Court, we are faced squarely with the question of the meaning of "home" within section 162(a)(2).

Examination of the legislative history surrounding the introduction of the phrase "away from home" into the Revenue Act of 1921 is inconclusive as to Congressional intent regarding the meaning of "home." As early as 1927, however, the Board of Tax Appeals held that the precursor of section 162(a)(2) was intended to permit a deduction for traveling expenses only if the expenses were incurred while the taxpayer was away from his "post of duty" or place of employment. *Mort L. Bixler,* 5 B.T.A. 1181 (1927). The word "home" thus became a term of art with a meaning different from its normal usage as residence, domicile or dwelling place; and the "tax home" doctrine was established.

Since the Tax Court's decision in the *Bixler* case the Commissioner has consistently maintained that

"home" in the statute means "tax home" and that one's tax home is one's "home post" or place of employment. This construction has been accepted by a number of courts. See *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945); *O'Toole* v. *Commissioner*, 243 F. 2d 302 (2nd Cir. 1957).

In *Wallace* v. *Commissioner*, 144 F. 2d 407 (9th Cir. 1944), however, this court rejected the "tax home" doctrine and held that the traveling expenses of a taxpayer who regularly lived in San Francisco but visited Los Angeles on business met the statutory requirement that traveling expenses be incurred while away from home. In *Wallace* we unequivocally stated that "home" as used in the statute should be given its ordinary and usual meaning. *Wallace* v. *Commissioner*, *supra*, at 410.

A chance to resolve a conflict among the circuit courts as to the meaning of "home" to which our opinion in *Wallace* contributed came before the Supreme Court in *Flowers* v. *Commissioner*, 326 U.S. 465 (1946). In considering the travel expense deduction the court set out three requirements, each of which had to be met before the deduction would be allowed.

> "(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred 'while away from home.'
>
> (3) The expense must be incurred in pursuit of business * * *."

The court noted the division of opinion regarding the meaning of "home" in the circuit courts but found it unnecessary to reconcile because in its view of the case the expenses involved did not meet the third re-

quirement of being incurred in pursuit of business. *Flowers* thus avoided rather than settled the "home" controversy.

Strictly applied, the "tax home" doctrine would greatly restrict the travel expense deduction; and the Tax Court soon recognized an exception to it in cases where the taxpayer's employment away from home could be considered "temporary." *Chester D. Griesemer*, 10 B.T.A. 386 (1928); *Walter F. Brown*, 13 B.T.A. 832 (1928); accord *Coburn* v. *Commissioner*, 138 F. 2d 763 (2d Cir. 1943). However, where the employment away from home was of indefinite or indeterminate duration, the deduction was denied. *Willard S. Jones*, 13 T.C. 880 (1949). The Commissioner accepted the "temporary-indefinite" distinction and recognized "temporary" employment as an exception to the rule that "home" equals place of employment. I.R.S. Pub. No. 300, 5 CCH 1956 Stand. Fed. Tax Rep. para. 6347; Rev. Rul. 189, 1960-1 Cum. Bull. 60, 65.

The Supreme Court had a second opportunity to clarify the "home" controversy when the question of the scope of the "temporary" employment exception came before it in *Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958). In *Peurifoy* three construction workers claimed deduction for living expenses incurred while living for periods of from eight to twenty months at construction sites some distance from their permanent residences. The Tax Court allowed the deductions on the ground that the employment away from home was "temporary." The Fourth Circuit assumed without deciding that the temporary employment exception was valid and that it applied to the "exigencies of the business" requirement as well as the "away from home" requirement set out in *Flowers* v. *Commissioner*, *supra*. The court then reversed because the tax-

payers had not met their burden of proof of showing their employment was temporary and not indefinite.

Upon review on writ of certiorari the Supreme Court made the same assumptions and stated:

> "Generally, a taxpayer is entitled to deduct unreimbursed travel expenses * * * only when they are required by the exigencies of business * * *.
>
> To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case where the taxpayer's employment is 'temporary' as contrasted with 'indefinite' or 'indeterminte.' * * * The respondent does not in the present case challenge the validity of this exception to the general rule."

The Commissioner contends that in *Peurifoy* the Supreme Court approved the temporary employment concept as an exception to its rule in *Flowers* v. *Commissioner, supra,* and that, therefore, a post of indefinite or indeterminate employment necessarily becomes the taxpayer's "tax home." It is clear from the language quoted above, however, that the validity of the temporary employment exception was assumed without decision by the Supreme Court in *Peurifoy* because the court did not consider that a challenge to the exception was before it. The court affirmed on the ground that it would not disturb the circuit court's factual assessment that the employment involved was not temporary. And for the second time the Supreme Court specifically avoided a definition of the word "home."

This was our position in *Harvey* v. *Commissioner,* 283 F. 2d 491 (9th Cir. 1960), when we stated:

> "Peurifoy, then, does not establish the rule, as suggested by the Commissioner, that the place where a taxpayer is employed for an 'indefinite' period, is *necessarily* his tax home."

In *Harvey* the taxpayer maintained his home in Santa Monica, California, where he worked for the Douglas Aircraft Company. From Santa Monica he was transferred on temporary assignment to Edwards Air Force Base, 117 miles away. Taxpayer's tour of duty at Edwards was to be for an indeterminate length of time; he knew only that he would work there as long as he was needed, a period which in the circumstances of his job could be expected to last from a few months to two years. In fact, he remained thirteen months. The Tax Court found Edwards to be the taxpayer's home during the taxable year in question on the ground that his term of employment there was "indefinite." We concluded that when the term "indefinite" was used as the Tax Court used it, the test applied became a mechanical one, incapable of effectuating the purpose of the deduction provision, and we formulated a more flexible test:

> "An employee might be said to change his tax home if there is a reasonable probability *known to him* that he may be employed for a long period of time at his new station. What constitutes 'a long period of time' varies with circumstances surrounding each case. If such be the case, it is reasonable to expect him to move his permanent abode to his new station, and thus avoid the double burden that the Congress intended to mitigate. On the other hand, if it is very likely that taxpayer's stay away from home will be short, then it seems quite unreasonable to expect him to move his domicile, even though it cannot be said that his employment will terminate 'within a fixed or reasonably short period,' to use the words of the Tax Court."

In drawing the distinction between long and short periods of employment we did not reject the distinc-

tions which had been drawn by other courts, but we did reject the inflexible manner in which the distinction had been employed by the Commissioner and the Tax Court. We used the length of employment away from one's established home as a factor in determining what we considered to be the fundamental question in these travel expense cases—is it reasonable to expect the taxpayer to move his residence to his place of employment. Applying this test to the facts of the *Harvey* case, we held that the taxpayer could not reasonably have been expected to move his residence, and the deduction was allowed.[*]

In *Wright* v. *Hartsell*, 305 F. 2d 221 (9th Cir. 1962), we again looked to whether it would be reasonable to expect the particular taxpayer to move his home nearer to the place where he was working in determining the deductibility of claimed travel expenses. In *Wright* the taxpayer commuted daily from his residence in Pocatello, Idaho, to work at Atomic Energy Commission research sites seventy miles away in an inhospitable desert area remote from any town or place of habitation. We held that a taxpayer's inability to maintain a home in the usual sense at his place of employment was a valid reason for allowing the deduction as travel expenses of the resulting costs of transportation, food and lodging. We concluded, however, that the taxpayer had a duty to mitigate his expenses by moving as near to the job site as is reasonable. The deduction in *Wright* was

[*] In *Harvey* v. *Commissioner* both the taxpayer and the Commissioner had stipulated that "home" meant "home post" or place of employment and not place of abode. The meaning of "home" as such was, therefore, not before us, and we inquired only into the application of the distinction between temporary and indefinite employment.

accordingly measured with reference to the nearest habitable community to the employment site, the town of Areo, Idaho. As Areo was neither the taxpayer's actual residence nor his place of employment, our decision in *Wright* necessarily proceeded upon the basis that "home" as used in the statute means residence, with the qualification that the taxpayer should establish his residence as near to his place of employment as is reasonable.

The Commissioner has argued that rejection of the "tax home" doctrine will result in the deductibility of nondeductible commuting and other personal expenses. We think, however, that the words of section 162 limiting deductions to "ordinary and necessary" expenses stand to prevent such a result. It has been clear since the Supreme Court's decision in *Flowers v. Commissioner* that "the exigencies of business rather than the personal conveniences and necessities of [this taxpayer] must be the motivating factors." *Flowers v. Commissioner, supra.*

By placing the emphasis on the "ordinary and necessary" requirement of the statute, there is no necessity for attributing any special "tax sense" to the word "home." Both the Commissioner's distinction between temporary and indefinite employment and the "exigencies of business" test as set out in *Flowers v. Commissioner* look to the duration of employment as a principal factor in separating deductible business expenses from nondeductible personal expenses. The "exigencies of business" test follows directly and naturally from the "ordinary and necessary" requirement of the statute itself. The temporary-indefinite distinction, on the other hand, introduces into the

statute an extraneous concept formulated in the first place only to provide an exception to the Commissioner's strained rule that "home" equals place of employment. Neither the rule nor its exception are necessary and both obscure the fundamental question of whether expenses claimed as travel expenses under section 162 are ordinary and necessary business expenses. Deductibility under the statute need not turn on fictions and inflexible rules of thumb. By looking to the ordinary and necessary requirement of the statute the end result will in most cases be substantially the same, and the unfairness inherent in a strict application of the "tax home" doctrine will be avoided.

"Home" in the statute, then, means home in its ordinary and usual sense, as we stated long ago in *Wallace v. Commissioner*. The length of time a taxpayer is employed away from that home does not itself give the answer, but is a factor in determining the answer to the question whether the taxpayer could reasonably be expected to have moved his home. If it appears reasonable to have expected the taxpayer to move closer to his place of employment, then expenses claimed as travel expenses cannot be said to be "ordinary and necessary." On the other hand, if such a move appears unreasonable, the ordinary and necessary requirement is met, and the deduction will be allowed.

We turn now to the particular facts of the case before us. Taxpayer's duty station in the Far East was dictated by military orders. Marine Corps orders also prohibited him from establishing a home for his dependents in the Far East. There is no question here as to whether it was reasonable for taxpayer to

have moved his home. He had no choice but to maintain a separate residence for his family.[1] Accordingly, we hold that taxpayer's travel expenses while away from home during the taxable year in question were "ordinary and necessary" expenses and are deductible under section 162.

The Commissioner appears to be making the final argument in this case that taxpayer is not entitled to a deduction for the meal expenses because he has failed to show that he would not have been obliged to pay an equal amount for meals at his home post in the United States. The statute, however, specifically provides that "traveling expenses, (including the *entire* amount expended for meals and lodging)" is deductible. [Emphasis added.] We have determined the expenses claimed to have been ordinary and necessary. Taxpayer need make no further showing.

The judgment is reversed.

Ely, Circuit Judge, Dissenting:

I dissent. With our late Brother Orr, one of the noblest of men, I discussed my opposing views, and he, without doubt, would have expected and encouraged me to record them.

When the Marine Corps transferred the taxpayer to his post of duty in Japan, the assignment was for a period of fifteen months. The period was subject to extension by orders of the Marine Corps. As the majority points out, there were forty-nine days

[1] Taxpayer's position is similar to that of the public official who must maintain his home elsewhere than his official place of employment. In such cases the travel expense deduction has been granted. *United States* v. *Le Blanc*, 278 F. 2d 571 (5th Cir. 1960); *Moss* v. *United States*, 145 F. Supp. 10 (W.D.S.C. 1956); *Emmert* v. *United States*, 146 F. Supp. 322 (S.D. Ind. 1955).

during taxpayer's fourteen and one-half months of service in Japan when he was away from his station on temporary duty, placed in "travel status", and reimbursed for his expenses. For the remainder of the period of overseas duty, approximately thirteen months, the taxpayer received from the Government, in addition to his lodging, a tax-exempt payment of approximately $145 per month as a quarters and subsistence allowance. Notwithstanding the fact that the allowance for subsistence was $42.50 per month, the majority upholds the taxpayer's claim that the entire cost of his meals during the approximate thirteen-month period is a tax-deductible expense allowance. In so doing, the majority casts our circuit into direct conflict with Revenue Ruling 55-571, 1955-2 Cum. Bull. 44,[1] and with the decision of the Fourth Circuit in *Bercaw* v. *Commissioner*, 165 F. 2d 521 (1948), wherein the Court wrote,

> "The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem travel allowance * * *. Thus the expenditures for meals and striker service while at this post were personal living expenses and non-deductible * * *. This conclusion is inescapable when it is remembered that this officer has been paid commutation of quarters and a subsistence allowance, both of which allowances are not considered as income for the purposes of taxation."

[1] "members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling 'away from home' and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them."

165 F. 2d at 524. (Citations omitted.) See also *James R. Whitaker*, 24 T.C. 750 (1955).

Regardless of whether or not the taxpayer was "away from home" within the meaning of that language as it is used in section 162(a)(2), the only expenses which are deductible under the section are "traveling expenses". *Commissioner* v. *Flowers*, 326 U.S. 465, 90 L. Ed. 203, 66 Sup. Ct. 250 (1946). "The expense must be a reasonable and necessary *traveling* expense, as that term is generally understood." 326 U.S. 470. [Emphasis added.] It should follow that the question is not whether the taxpayer was "away from home", but whether during the period for which the expense is claimed he was actually "traveling". The Tax Court has determined that he was not, and our duty is to sustain the finding absent demonstration by the taxpayer that the finding was clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, 4 L. Ed. 2d 1218, 80 Sup. Ct. 1190 (1960); *Truck Terminals, Inc.* v. *Commissioner*, 314 F. 2d 449, 455 (9th Cir. 1963); *Young* v. *Commissioner*, 268 F. 2d 245 (9th Cir. 1959).

A factual determination of the Tax Court, supported by substantial evidence, should not, on review, be set aside as "clearly erroneous", unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Commissioner* v. *Duberstein*, *supra* at 291, quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 Sup. Ct. 525 (1948), and, in my opinion, the whole body of evidence clearly supports the Tax Court's finding. In the first place, the period of time for which the taxpayer was

assigned to his Japanese post made of that post his "permanent" station in a military sense. In making provisions for "travel and transportation allowances * * * upon a *change* of *permanent* station" (37 U.S.C. § 404(a). [Emphasis added.]), the Congress has recognized that a soldier's "permanent station", being subject to "change", is never permanent in an enduring sense. In the present case, however, the period of assignment, fifteen months with possibility of extension, was factually determined to be an "indefinite" period rather than a "temporary" period, and this should be an important, if not a controlling, consideration. *Puerifoy* v. *Commissioner*, 358 U.S. 59, 3 L. Ed. 2d 30, 79 Sup. Ct. 104 (1958). In the second place, the Marine Corps itself determined that the taxpayer, during his fourteen and one-half months in Japan, was not in "travel status" except for the forty-nine days when he was temporarily detached to locations comparatively short distances from his "permanent" Japanese post. If it be conceded that the Marine Corps' determination should not be conclusive, it nevertheless constitutes strong support for the Tax Court's factual decision. *William W. Todd*, 10 T.C. 655 (1948). See also *Allan Cunningham*, 22 T.C. 906 (1954).

The Congress has undertaken to assure that military men who serve our country overseas shall not suffer undue financial loss. It is provided that the Secretaries of the uniformed services may authorize payment to overseas military personnel of per diem allowances related to the cost of living, "including a cost of * * * subsistence", and such allowance is authorized to be made to the soldier "whether or not he

is in a travel status." 37 U.S.C. § 405, revising in 1962 without substantial change The Career Compensation Act of 1949, ch. 681, § 303(b), 63 Stat. 813. From these provisions I see an intent on the part of Congress that the soldier assigned to overseas duty shall not sustain significant financial loss and that any such loss shall be prevented by the direct payment of travel expenses and increased allowances rather than by tax deduction which might properly be claimed by others for whom no specific increased benefits are provided.[1]

I would affirm the Tax Court.

---

[1] I do not believe that in the selection of qualified military personnel for overseas duty, the Department of Defense should be invited to concern itself with increased cost to the Government depending upon whether one soldier is "away from home" and another soldier, with a different family status, is not.

In the so-called "Cuban crisis" of recent years, we read that the dependents of our military personnel stationed at Guantanamo Bay were removed to the United States. Would the majority say that those servicemen, immediately upon the transfer of their dependents, became "away from home" and commenced to "travel"?

It is anomalous and discriminatory that our servicemen now engaged in Vietnam are entitled, under the majority opinion, to a more favorable tax treatment in our circuit than are those who, while doubtless fighting with equal valor, are denied deductions for their "traveling" expenses in the Fourth Circuit and, apparently, in the Sixth Circuit also. See *Commissioner v. Moton*, 180 F. 2d 859 (6th Cir. 1950), wherein the court wrote, at 861,

"[An armed services officer] is limited in his personal expenditures chargeable to the government, or taxwise deductible, to the usual stipends fixed under appropriate regulations adopted in pursuance of Acts of Congress for his subsistence and travel expenses."

United States Court of Appeals for the Ninth Circuit

No. 19630

HOWE A. STIDGER AND BETT M. STIDGER, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States,

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States,

and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause be, and hereby is reversed.

Filed and entered December 27, 1965.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 173

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOWE A. STIDGER, ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 50–57) is reported at 40 T.C. 896. The opinion of the court of appeals (R. 62–73) is reported at 355 F. 2d 294.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1965 (R. 74). By orders of Mr. Justice Douglas, entered on March 29 and April 25, 1966, the time for filing the petition for a writ of certiorari was extended to May 26, 1966 (R. 75, 76). The petition was filed on May 25, 1966, and was granted on October 10, 1966 (R. 77). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether amounts expended for meals by a military officer stationed at a permanent duty post to which he is prohibited from bringing his family constitute deductible "traveling expenses * * * [incurred] while away from home" or nondeductible "personal [or] living" expenses, under the pertinent provisions of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;

* * * * * *

SEC. 262. PERSONAL, LIVING AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

Respondent[1] was during 1957 and 1958 a Captain in the United States Marine Corps. For approx-

[1] Mrs. Stidger is a party solely because a joint return was filed for 1958.

imately two and one-half years preceding October, 1957, he had been attached to a Marine Air Squadron stationed at El Toro, California. During this period he lived with his family in nearby Santa Ana. (R. 51.)

On October 1, 1957, respondent, together with his squadron, was assigned to a new permanent duty station in the Far East for 15 months. On that date, he departed from El Toro, California, for Iwakuni, Japan. Dependents of Marine Air personnel were prohibited by Marine Corps orders from accompanying such personnel to Iwakuni. (R. 15–16, 26.) During respondent's 15-month tour of duty abroad, his family continued to reside in Santa Ana, California (R. 51). While respondent was stationed at Iwakuni, the Marine Corps furnished him free quarters (R. 16). Like all commissioned officers, he was, however, required to pay for his own meals which were available at the post's officers' mess for approximately $65 per month (R. 41, 52).[1] During the period respondent was in Japan, he continued to receive $102.50 a month as a tax-free quarters allowance for his family and approximately $42.50 a month tax-free allowance for his subsistence.[2] In December, 1958, respondent was assigned to a new permanent duty station at the

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[1] Respondent was reimbursed for the cost of his meals by means of a per diem allowance for 49 of the days he was away from Iwakuni on official business during 1958; he does not claim any deduction for meals on these days (R. 16, 37, 42).

[2] Respondent was actually entitled by law to a monthly subsistence allowance of $47.88. Act of May 19, 1952, c. 310, 66 Stat. 90, § 1 (37 U.S.C. 1958 ed., § 251). The record does not show why he received only $42.50.

Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July, 1962. (R. 16, 45, 53.)

On his 1958 income tax return, respondent deducted the $650 he had spent for meals at Iwakuni, Japan computed on the basis of $65 per month for ten months. The Commissioner disallowed the deduction. The Tax Court found that respondent's stay at Iwakuni was "not temporary" and that during 1958 his "home" within the meaning of § 162(a)(2) of the Internal Revenue Code of 1954 was his military post of duty in the Far East. Accordingly, the Tax Court decided that the expenses in question were not incurred while "traveling * * * away from home." (R. 50–57.)

The court of appeals, one judge dissenting, reversed the Tax Court on the ground that respondent's "home" was his family residence in California, and that he was thus "away from home" while stationed at Iwakuni (R. 62–73).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the question whether a Marine Officer who was stationed at Iwakuni, Japan, away from his family for a period of approximately 15 months, and who received a tax-free subsistence allowance for meals, may deduct the cost of his meals at the officers' mess as "travel expenses * * * while away from home" under § 162(a)(2) of the 1954 Code. Although this case involves only the definition of the "home" of a military officer, the answer to that question requires an examination of the basic congressional purpose in permitting the deduction of "traveling expenses * * * while away from home in the pursuit

of a trade or business." In order to put the question in this case in its proper context, we shall therefore first discuss the general question of the meaning of "home" under § 162(a)(2), and then deal with the application of this concept to military personnel.

It is the Commissioner's position that a deduction is improper because the respondent was not away from his "home" as that word is used in § 162(a)(2). Over the past 45 years, the Commissioner has consistently construed "home" in § 162 as the taxpayer's principal post of duty or employment, which in this case was Iwakuni, Japan. This long-standing interpretation of the statute has been approved by the great majority of courts considering the question and implicitly by Congress through re-enactment in identical language of the travel expense provision in all internal revenue statutes from 1921 to 1954. Moreover, the Congressional debates in connection with a 1952 amendment to § 162 make it clear that Congress was aware of the Commissioner's interpretation of "home." Instead of altering the Commissioner's well-accepted construction of § 162, Congress in 1952 created a limited exception to the general rule in order to permit Congressmen to deduct part of their expenses of living in Washington.

The Commissioner's interpretation is an eminently reasonable one, which effectively and fairly serves to draw the line between deductible business expenses under Code § 162 and nondeductible "personal, living, or family expenses" under § 262. It clearly represents an appropriate exercise of the Commissioner's rule-making power.

Although for purposes of § 162 a taxpayer's principal place of business ordinarily is his home, the Commissioner, with the approval of the courts, has recognized a limited exception to this general rule where the taxpayer's stay at a particular business post is only "temporary." As the Tax Court found, respondent was not at Iwakuni for a temporary period. The Commissioner has ruled that where a taxpayer expects to remain at a post for 12 months or more, his stay is generally not temporary. The record shows that respondent expected to be, and was, in the Far East for approximately 15 months, and his stay was thus not temporary.

The well-established interpretation of "home" in § 162 is especially appropriate for military personnel. Indeed, whether or not a taxpayer's more-than-temporary place of business or employment is considered his home under § 162(a)(2) for taxpayers in all circumstances, the facts of military life require the conclusion that a military officer's place of permanent duty is his home in the everyday sense of the word. Typically, a serviceman's permanent military post is the place where he engages in normal living activities. It is the place where he eats, sleeps, works and engages in recreation. He uses post facilities for education, worship and similar activities associated with home. In a real sense, the military post is his home.

Furthermore, to construe a serviceman's home as other than his permanent duty post and consequently to permit him to deduct the cost of his meals as travel expenses would distort the basic purpose of § 162(a)(2) and give respondent and similarly situated serv-

icemen advantages not available to other taxpayers. The travel expense deduction of § 162 is intended to alleviate the financial burden on a taxpayer who normally incurs additional living expenses when traveling on business. The average business traveler who is away from his family incurs duplicate lodging costs when he stays in hotels and higher food costs when he eats in restaurants. Military officers, like respondent, on the other hand, are provided with free lodging and given a tax-free subsistence allowance with which to purchase food which is provided by the military at low cost. Since an officer does not bear the substantial additional costs usually associated with travel, granting him a deduction for his normal living expenses would be contrary to the policy of § 262 which makes the normal living expenses of any taxpayer nondeductible. Moreover, if he is given a deduction for the cost of his food which has been reimbursed in whole or in large part by a tax-free subsistence allowance, he would also receive a wholly unwarranted windfall. This inequitable result can and should be avoided by treating a serviceman's permanent post of duty as his home within the meaning of Code § 162.

ARGUMENT

I

A TAXPAYER'S "HOME" FOR PURPOSES OF § 162(a)(2) OF THE 1954 CODE IS HIS PRINCIPAL PLACE OF BUSINESS OR EMPLOYMENT

1. In all internal revenue statutes beginning with the Revenue Act of 1921 down to § 162 of the 1954 Code,

Congress in identical language has granted a deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."[4] As this Court noted in *Commissioner* v. *Flowers*, 326 U.S. 465, 471, the Treasury Department's administrative rulings, dating from 1921, have consistently treated the statutory word "home" as meaning a taxpayer's principal place of business or employment, *i.e.*, the locality where a taxpayer is principally assigned to work, not the locality where he maintains his residence (although usually the two will be the same).[5] Thus, for a period of forty-five years the Commissioner has consistently held that a taxpayer is generally entitled to the travel expense deduction only when he is away from his regular work. Moreover,

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[4] Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 214(a); Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 214(a); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 214(a); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23(a); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23(a); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23(a); Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 23(a); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23(a); Internal Revenue Code of 1939, Sec. 23(a) (26 U.S.C. 1952 ed., Sec. 23(a)); Internal Revenue Code of 1954, Sec. 162, *supra*, p. 2.

[5] See, *e.g.*, O.D. 864, 4 Cum. Bull. 211 (1921); O.D. 1021, 5 Cum. Bull. 174 (1921); I.T. 1264, I-1 Cum. Bull. 122 (1922); I.T. 1355, I-1 Cum. Bull. 194 (1922); I.T. 1380, I-2 Cum. Bull. 88 (1923); I.T. 1404, I-2 Cum. Bull 145 (1922); G.C.M. 4956, VII-2 Cum. Bull. 128 (1928); I.T. 3514, 1939-2 Cum. Bull. 152; G.C.M. 23672, 1943 Cum. Bull. 66; I.T. 3842, 1947-1 Cum. Bull. 11; Rev. Rul. 54-147, 1954-1 Cum. Bull. 51; Rev. Rul. 54-497, 1954-2 Cum. Bull. 75; Rev. Rul. 55-235, 1955-1 Cum. Bull. 274; Rev. Rul 55-236, 1955-1 Cum. Bull. 274; Rev. Rul. 56-49, 1956-1 Cum. Bull. 152; Rev. Rul. 60-189, 1960-1 Cum. Bull. 60.

the Tax Court, since 1927, has consistently followed this administrative interpretation in a wide variety of factual situations.[6]

Likewise, except for the Ninth and possibly the Fifth and Sixth Circuits,[7] all the courts of appeals

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[6] See *e.g.*, *Bixler* v. *Commissioner*, 5 B.T.A. 1181; *Duncan* v. *Commissioner*, 17 B.T.A. 1088, affirmed *per curiam*, 47 F. 2d 1082 (C.A. 2); *Lindsay* v. *Commissioner*, 34 B.T.A. 840; *Priddy* v. *Commissioner*, 43 B.T.A. 18, petition for review dismissed July 23, 1941 (C.A. 5); *Gustafson* v. *Commissioner*, 3 T.C. 998; *Tyler* v. *Commissioner*, 13 T.C. 186; *Carroll* v. *Commissioner*, 20 T.C. 382; *Garlock* v. *Commissioner*, 34 T.C. 611; *Green* v. *Commissioner*, 35 T.C. 764, affirmed *per curiam*, 298 F. 2d 890 (C.A. 6); *Friedman* v. *Commissioner*, 37 T.C. 539 (1961); *Lipps* v. *Commissioner*, decided March 26, 1962 (21 T.C.M. 358); *Capps* v. *Commissioner*, decided March 23, 1964 (23 T.C.M. 482).

[7] As this Court noted in the *Flowers* case, *supra*, p. 472, the Ninth Circuit in *Wallace* v. *Commissioner*, 144 F. 2d 407, rejected the view that the word "home" as used in the statute is equivalent to the taxpayer's post of duty and instead confined the term to the taxpayer's actual residence. However, in that case the taxpayer was away for a temporary period, and should have been entitled to a deduction under the Commissioner's exception to the general rule for temporary absences, discussed *infra*. Thus, *Wallace* is not inconsistent with the Commissioner's interpretation of the statute. In *Harvey* v. *Commissioner*, 283 F. 2d 491 (C.A. 9), the next case which arose in the Ninth Circuit involving the meaning of home, the court seemed to accept the Commissioner's definition. Subsequently, however, in *Wright* v. *Hartsell*, 305 F. 2d 221 (C.A. 9), and the instant case, it has returned to the definition of home set forth in *Wallace* without a reconsideration of that case in the light of the Commissioner's present interpretation of the statute.

The Fifth Circuit, it seems, has generally agreed with the Ninth Circuit's interpretation (see *Flowers* v. *Commissioner*, 148 F. 2d 165 (C.A. 5), reversed on other grounds, 326 U.S. 465; *Steinhort* v. *Commissioner*, 335 F. 2d 496 (C.A. 5); *United States* v. *LeBlanc*, 278 F. 2d 571–572 (C.A. 5)), but

that have decided the question[3] have approved the Commissioner's interpretation of "home." In *O'Toole* v. *Commissioner*, 243 F. 2d 302, 303, for instance, the Second Circuit flatly stated that "'home' as used in the statute means the taxpayer's principal place of business or employment." See also *Martin* v. *Commissioner*, 295 F. 2d 38 (C.A. 3), affirming per curiam 19 T.C.M. 1216 (decided October 11, 1960); *Coerver* v. *Commissioner*, 297 F. 2d 837 (C.A. 3), affirming *per curiam* 36 T.C. 252; *Barnhill* v. *Commissioner*, 148 F. 2d 913 (C.A. 4); *Bercaw* v. *Commissioner*, 165 F. 2d 521 (C.A. 4); *England* v. *United States*, 345 F. 2d 414 (C.A. 7), certiorari denied, 382 U.S. 986; *Ney* v. *United States*, 171 F. 2d 449 (C.A. 8), certiorari denied, 336 U.S. 967; *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8); and *York* v. *Commissioner*, 160 F. 2d 385 (C.A. D.C.).

In *Commissioner* v. *Flowers*, *supra*, at p. 465, this Court upheld another aspect of the Commissioner's long-standing position on traveling expenses. The Court there stated that where the Commissioner had over a long period of years consistently interpreted what is now § 162(a)(2) to exclude any deduction for commuting expenses, his interpretation would be "deemed to possess implied legislative approval and to have the effect of law. *Helvering* v. *Winmill*, 305

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in the light of its decision in *Olaunch* v. *Commissioner*, 264 F. 2d 309 (C.A. 5), its exact position on the problem appears unclear. Likewise, in view of its later action in *Green* v. *Commissioner*, 298 F. 2d 890 (C.A. 6), the Sixth Circuit's apparent alignment in *Burns* v. *Gray*, 287 F. 2d 698 (C.A. 6), with the interpretation of the Ninth Circuit seems to be in doubt.

[3] The First Circuit does not appear to have taken a position in this matter.

U.S. 79; *Boehm* v. *Commissioner*, 326 U.S. 287." The same rationale applies in the instant case.

In fact, the Treasury's definition of "home" was brought forcefully to the attention of Congress in 1952, and Congress at that time apparently accepted the Commissioner's long-standing interpretation. Prior to 1952, it was well established, since at least 1936, that members of Congress could not deduct, as business traveling expenses, the cost of meals and lodging while in Washington. *Lindsay* v. *Commissioner*, 34 B.T.A. 840. Since Washington is the principal post of duty of a member of Congress, it is, under the settled rule, his "home" for tax purposes, even though his family residence is located in the district he represents. In 1952, Congress specifically amended § 162's predecessor to provide that a Congressman's "home" is his residence in the district he represents, and that he would be allowed a deduction of up to $3,000 for his living expenses in Washington. Legislative Branch Appropriation Act, 1953, c. 598, 66 Stat. 464; now 1954 Code § 162(a) (last paragraph). The debates in Congress on this amendment show that Congress was aware of the Commissioner's construction of the word "home" for purposes of § 162(a)(2). 98 Cong. Record, Part 4, 5280, Part 5, 8282. Congress dealt with the problem by providing a specific deduction for a congressman's living expenses in Washington. Thus, it would appear that Congress accepted the Commissioner's interpretation of the statute under which, without such a specific exception, a congressman could not deduct his living expenses because Washington, as his principal place of duty, was his "home."

2. The Treasury Department's interpretation of § 162(a)(2) is a sound one which reasonably and fairly coordinates that section with § 262 of the 1954 Code. Section 262 prohibits the deduction of "personal, living, or family expenses" which generally would include the cost of meals and lodging.[9] Prior to 1921, the internal revenue laws contained no specific provision relating to travel expenses. The Income Tax Act of 1913 permitted deductions only for those "necessary expenses actually paid in carrying on any business, not including personal, living, or family expense."[10] In interpreting this provision the Commissioner initially permitted the deduction only of transportation costs, *excluding* food and lodging, since the latter were considered personal living expenses.[11]

This latter regulation was unfair to the taxpayer who was required to travel for business reasons, since it failed to recognize that in traveling a taxpayer normally incurs additional living expenses. The cost of his lodging, while traveling, usually duplicates the amount he is already paying for housing, and the

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[9] In *Flowers*, *supra*, at 469, this Court specifically pointed out that § 162(a)(2)'s predecessor (§ 23(a)(1)(A) of the 1939 Code) "is to be contrasted with" § 262's precursor (§ 24(a)(1) of the 1939 Code).

[10] Income Tax Act of 1913, c. 16, 38 Stat. 114, 166, Section IIB; substantially the same provision appeared in the Revenue Act of 1916, c. 463, 39 Stat. 756, Section 5, and the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sections 214 and 215.

[11] Treasury Regulations 45 (1919 ed.), Article 292. This regulation also provided that taxpayers who received a traveling allowance for meals and lodging must include as income only the excess of the allowance over the actual expenses incurred, thereby favoring those taxpayers whose expenses were reimbursed.

cost of his food in restaurants is likely to be greater than the cost of his food when living with his family. Consequently, the Commissioner amended the regulation one year later to permit the deduction of reasonable expenses for meals and lodging on a business trip in excess of any expenditures ordinarily required for such purposes.[12]

The regulation, as amended, was both logically sound and equitable. It recognized that the excess amount which a taxpayer is required to pay for food and lodging when away on a business trip is a cost of earning income. Since the income tax is imposed on net income, it is proper to permit an ordinary business deduction for the additional cost of food and lodging incurred only because of the business trip. The deduction also placed the traveling businessman on the same tax footing as the non-traveling businessman. Neither was entitled to deduct his usual living costs; only the excess above the normal level was deductible as a business expense.

The regulation, however, proved administratively "too cumbersome a procedure," and at the suggestion of the Treasury Department,[13] the Revenue Act of 1921 permitted a deduction for "traveling expenses (including *the entire amount* expended for meals and

[12] T.D. 3101, 3 Cum. Bull. 191 (1920). The new regulation also required taxpayers to include as income any allowance received as a reimbursement for living expenses and consequently eliminated the discrimination noted in fn. 11, *supra*.

[13] Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 2 and 13, 1921 (Confidential Committee Print, subsequently released for publication), pp. 50, 234–235.

lodging) while away from home in the pursuit of a trade or business" (emphasis supplied)." The Treasury Department's proposal—which Congress accepted—was based on the reasonable assumption that a taxpayer who travels on business will ordinarily incur greater living expenses than normal, and that although only the additional living expenses caused by travel should properly be deductible as business expenses, the burden on the taxpayer of establishing those extra costs and on the Internal Revenue Service in auditing them is too great to justify permitting only the lesser deduction. Consequently, since 1921 the internal revenue laws have permitted the deduction of traveling expenses, including the entire amount expended for meals and lodging, although this gives the business traveler a somewhat larger deduction than he is entitled to—*i.e.*, it allows him to deduct both the amount he would have spent on meals if he had remained at "home" as well as the excess incurred because of the business trip.

The Commissioner immediately took steps to insure that the deduction would not be abused. He adopted the administrative position (consistently maintained throughout the last 45 years) that the deduction is allowable only when the taxpayer is temporarily traveling on business away from his principal post of duty or employment. It is clear that the deduction for business traveling expenses was intended to provide relief to a taxpayer whose trade or business requires him to travel temporarily or intermittently away from the locality which is his regular place of business or employment. Stated dif-

[14] Revenue Act of 1921, c. 136, 42 Stat. 227, § 214.

ferently, § 162(a)(2) is intended to ameliorate the financial hardship on the taxpayer who incurs unreimbursed additional living expenses when traveling away from his regular location on business, and to place him, insofar as it is practicable, for tax purposes on a parity with the "stay-at-home" taxpayer. Were a taxpayer permitted to deduct his normal expenses for meals and lodging at the locality of his regular place of business, the mandate of § 262—forbidding the deduction of personal expenses—would be frustrated; for obviously all taxpayers engaged in trade or business must incur such living and personal expenses, wherever they may keep their living headquarters. Cf. *Commissioner* v. *Moran*, 236 F. 2d 595, 597 (C.A. 8). In the light of the history of § 162, the Treasury Department's interpretation of "home" as a taxpayer's principal place of business or employment for longer than a temporary period effectuates the purpose and intent of Congress in a fair and reasonable manner.

Moreover, this interpretation and its application to individual cases represents an appropriate exercise of the Commissioner's rule-making powers in an area that has serious administrative problems. There is an inherent difficulty in drawing a line between personal living expenses that are proximately related to business and those living expenses that have too remote a relationship to business activity to qualify as deductible business expenses. In order to avoid the uncertainty of a case-by-case approach, the Commissioner has exercised his power to draw a line between the two types of expenses by defining a taxpayer's "home" as his principal place of business or employ-

ment"[15]—an interpretation which implements the objective of § 162(a)(2) and results in a reasonable and equitable accommodation of that section to § 262.

3. The interpretation of "home" adopted by the court of appeals in this case would inevitably require the difficult case-by-case approach that the Commissioner's rule was designed to avoid. The Ninth Circuit would permit a taxpayer to deduct his living expenses while away from his residence on business unless "it [is] reasonable to expect the taxpayer to move his residence to his place of employment" (R. 68). Applying such a test may be easy in the unusual case presented here where the taxpayer was forbidden by military orders to bring his family with him. In the overwhelming number of cases it is likely to be extremely difficult. The Commissioner and the courts would have to consider a large number of complex factors, such as the adequacy of housing at the new post, the expense of moving, the schooling requirements of the taxpayer's children, the climate at the taxpayer's new business post, the health of the taxpayer's wife and children, and the need to care for elderly or ailing relatives. The Commissioner and the courts are ill suited to making determinations of this nature. Ascertaining and evaluating the relevant factors and deciding whether it is reasonable for a particular taxpayer to move his residence would not only present a great administrative burden but would also threaten the uniform application of tax laws because of the vagaries inherent in such a concept of reasonableness. The Commissioner's construction of home in § 162(a)(2) avoids these pitfalls.

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[15] Cf. *England* v. *United States*, 345 F. 2d 414 (C.A. 7), certiorari denied, 382 U.S. 986, involving the deductibility of business-related moving expenses.

II

A MILITARY OFFICER'S "HOME" FOR PURPOSES OF § 162 IS HIS PERMANENT DUTY POST

1. Under the long-standing definition of a taxpayer's home for purposes of § 162 as his more-than-temporary post of duty or employment, respondent was not traveling away from home while stationed at Iwakuni. From the time he was transferred to Iwakuni he knew that his stay in the Far East would be approximately 15 months, and that during this period his family could not accompany him (R. 15–16, 38). He was in fact stationed at Iwakuni for 14½ months. Thus under the meaning of "home" discussed in Point I, respondent's "home" was Iwakuni because it was his permanent duty station.

As this Court noted in *Peurifoy* v. *Commissioner*, 358 U.S. 59, 60, the Commissioner and the courts have engrafted an exception upon the general rule that a taxpayer's principal place of business or employment is his home. Under this exception, a taxpayer who is employed *temporarily* at a particular place on business is regarded as "traveling * * * away from home."[16] This exception is based on the theory

[16] E.g., *Schurer* v. *Commissioner*, 3 T.C. 544; *Bark* v. *Commissioner*, 6 T.C. 851; *Leach* v. *Commissioner*, 12 T.C. 20; *Loden* v. *Commissioner*, decided January 31, 1956 (15 T.C.M. 134); *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.A. 2); *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8); G.C.M. 10915, 1932-2 Cum. Bull. 245; G.C.M. 23672, 1943 Cum. Bull. 66; Rev. Rul. 190, 1953-2 Cum. Bull. 303; Rev. Rul. 54-497, 1954-2 Cum. Bull. 75; Rev. Rul. 55-235, 1955-1 Cum. Bull. 274; Rev. Rul. 60-189, 1960-1 Cum. Bull. 60; Rev. Rul. 60-314, 1960-2 Cum. Bull. 48.

that it is inequitable to call a taxpayer's temporary place of employment his "home," since he must, as a practical matter, maintain a residence elsewhere. On the other hand, if a taxpayer's employment is indefinite or indeterminate rather than temporary, he is not "traveling * * * while away from home." The Commissioner has ruled, in general, that a taxpayer's employment is more than temporary if his "actual or anticipated" stay is "a year or more." Rev. Rul. 60–189, 1960–1 Cum. Bull. 60, 63.

Whether a taxpayer's post of duty is temporary within the scope of this ruling, presents a factual issue. *Peurifoy* v. *Commissioner, supra* at 60–61. Here the Tax Court correctly concluded that (R. 55):

> Although petitioner's tour of duty in the Far East was for a period of approximately 15 months, we do not think it can be said to be a temporary assignment. While 15 months may have lacked real permanence, "the mere absence of permanence does not necessarily imply that degree of temporariness which would allow deductibility of traveling expenses." *Floyd Garlock,* 34 T.C. 611, 616. Cf. *Beatrice H. Albert, supra.* We have found as an ultimate fact that petitioner's stay in the Far East was not temporary.

The court of appeals found it unnecessary to review this finding. The record shows, however, that respondent was sent to, and expected to remain at, Iwakuni for approximately 15 months (R. 38). Thus, he does not come within the exception permitting the

deduction of expenses incurred at a temporary place of employment.

2. Even if a taxpayer's more-than-temporary place of business or employment were not considered to be his home under § 162(a)(2) in all circumstances, the facts of military life require that a serviceman's permanent duty post be treated as his "home". In the case of a serviceman, like respondent, this post will inevitably be the community in which his professional and personal activities are focused and will be his "home" in the ordinary everyday sense of that word.

At the outset, the typical pattern of military life, which sets the serviceman apart from the ordinary taxpayer, must be recognized. Military life demands discipline and regimentation not required in other occupations. Perforce, a serviceman must allow his government employer to regulate his life and provide for his needs to a degree unparalleled in civilian life. Furthermore, military service also requires frequent changes of duty posts. Especially since World War II, our global defense responsibilities have required the shifting of American servicemen from military post to military post throughout the world. Since frequent transfers are a constant factor of military life, the military post plays a part in the serviceman's life quite unlike that the office or employment headquarters may have for the civilian. It is clear that in the context of military life it is reasonable to treat the serviceman's permanent duty station as his "home" for tax purposes.

Of course, the serviceman, especially when he is stationed away from his family, may not view his military post as his home in a sentimental way. He may well consider as his "home town" the place where his family lives, his last civilian residence, or the place where he hopes to settle when he completes his military service. Yet, despite emotional ties to other locations, the serviceman's permanent military post is his home in the sense that it is the community in which his day-to-day professional and personal activities are focused. Ordinarily he will eat at a post mess, sleep in barracks or a bachelor officer's quarters on the post, and work on or near the post. A serviceman receives his medical attention at the post dispensary, purchases a large part of his personal needs at the post commissary or PX, patronizes the post laundry and barber shop, and uses the post athletic facilities. He is entertained at the post theater and in the enlisted men's or officers' clubs which are on the post. He frequently attends church at the post chapel and classes in post educational facilities. In short, when a serviceman is permanently assigned to a military post like Iwakuni, it constitutes the community in which his professional and personal activities occur. It thus accords with the realities of everyday service life to regard the post as his home.

Moreover, as we have shown (*supra*, pp. 12–14), § 162 is designed to permit a taxpayer to deduct what would otherwise be nondeductible personal expenses when he incurs significant additional living expenses as a cost of earning income. Such a deduction reduces the financial burden which a taxpayer must bear when he travels on business. In the case of servicemen, how-

ever, Congress and the military have already lessened or eliminated any financial burden which might result from changes of duty posts and family separations. The government provides a system of tax-free benefits and allowances more appropriate to the serviceman's special situation than would be an expense account plan or a deduction under § 162. This unique arrangement is facilitated, of course, by the fact that the serviceman works for and pays taxes to the same entity. Congress and the military services have endeavored to insure that a serviceman will not incur the significant additional living expenses usually associated with business travel, by giving him tax exempt allowances to cover most or all of such expenses. If a serviceman also were given a deduction for his ordinary living expenses at his principal duty station, he would receive an unwarranted tax windfall that would conflict with the purposes of §§ 162 and 262, which in combination forbid the deduction of normal living expenses.

The system of allowances and benefits provided by Congress and the military assures that a serviceman's basic living requirements are provided without significant financial burden to himself whatever his marital state and wherever he is stationed. For instance, the enlisted man who is unmarried or living apart from his family receives his food and lodging in kind without charge. The married enlisted man living with his family will usually receive a tax-free quarters allowance [17] and tax-free allowance equal to

[17] 37 U.S.C. 403. The Government may supply quarters to him and his family in lieu of the allowance. 37 U.S.C. 403(b).

the commuted value of the food he would have received in kind.[18] Thus the married enlisted man who receives a tax-free allowance to buy his food and lodging is in approximately the same position as the enlisted man who receives his food and lodging in kind. Since both receive food and lodging tax free, both are in a better position than the civilian who must pay his living expenses from his net income after taxes. This system also ensures that the enlisted man who is separated from his family will not incur additional living expenses. He will receive his food and lodging in kind and will continue to receive either housing for his dependents or a tax-free allowance for their housing.

The lodging requirements of an officer are provided in the same basic way as are the enlisted man's. The officer either receives his quarters in kind without charge or receives a tax-free allowance in lieu thereof.[19] In the event an officer is sent to a permanent post where dependents may not accompany him, he will receive either quarters in kind, as respondent did, or a tax-free quarters allowance in addition to the tax-free quarters allowance he continues to receive for his family.[20] Thus, whatever his marital status and wherever he is stationed, an officer receives quarters without cost to himself and tax free, and is in a posi-

[18] 37 U.S.C. 402. Career enlisted men who live with their families are ordinarily granted permission to eat separately from other enlisted men. In 1963 there were about 800,000 members who received $1.03 per day as a commuted ration. Report of Committee on Armed Services, on Military Pay Increase, H. Rep. No. 208, 88th Cong., 1st Sess., p. 22.

[19] 37 U.S.C. 403.

[20] 37 U.S.C. 403, 427.

tion quite unlike the businessman whose lodging costs will increase when he is away from his family.

Instead of supplying food in kind to officers, Congress has provided each officer with a tax-free subsistence allowance of $47.88 per month, which is intended to cover the cost of his meals at the officer's mess.[21] As the Hook Commission,[22] which designed the basic framework of the present military pay system, stated:

> The theory behind the subsistence allowance is that since the officer is required to arrange and provide his subsistence at all times and since he has no choice as to the place where he is to be stationed and therefore does not have the choice of the average citizen as to the place and manner of subsisting himself, it is necessary to provide him with an allowance at all

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[21] 37 U.S.C. 402; Advisory Commission on Service Pay, Career Compensation for the Uniformed Services, p. 11 (1948) (see fn. 22).

Where an officer cannot possibly exercise any choice with regard to his food, as for example when he is assigned to a hospital or is serving in the field, the cost of his food may be deducted directly from his subsistence allowance. Army Regulation 30-41 (10 Dec. 1965); Navy Comptroller Manual, Section 044025 (26 Jan. 1966); *Morriss* v. *United States*, 139 F. Supp. 767 (Ct. Cl.).

[22] Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces, Appendix, p. 17 (1948). This body, otherwise known as the Hook Commission, was appointed by the Secretary of Defense in 1947 to make a thorough review of the pay structure and scales of the Armed Forces. The Commission submitted a report in December, 1948. The Commission's recommendations were adopted in large part in the Career Compensation Act of 1949, c. 681, 63 Stat. 812, § 301. See Report of Committee on Armed Services, H. Rept. No. 779, 81st Cong., 1st Sess., p. 2.

times so that he may bear that expense wherever stationed.

With respect to the amount of such a subsistence allowance, the Hook Commission stated: "The appropriate guide for this determination * * * is the amount equivalent to defray the cost to the individual of the officer's mess, since, normally, an officer would subsist himself in this fashion."[33] An Army officer, for example, may obtain his meals at the post officers' mess for $1.60 per day, or $48 per thirty-day month, almost the exact amount of his monthly subsistence allowance of $47.88.[34] Thus an Army officer, no matter where he is stationed, can obtain his food for substantially the amount of his subsistence allowance. As we have already pointed out, he is also provided free lodging by the military. Therefore, an Army officer, even when he is permanently assigned to a post apart from his wife and family, will not incur any expenses beyond those he would have incurred had his family accompanied him.

In this respect the serviceman is in a position analogous to the taxpayer in *James* v. *United States*, 308 F. 2d 204 (C.A. 9). In that case the question was whether a traveling salesman, who was constantly on the road, was entitled to deduct his living expenses as "traveling expenses * * * while away from home." The salesman claimed one of the towns he visited regularly, Reno, Nevada, as his home. Although he had no permanent apartment or other living accommodations in Reno, it was there that he maintained his post office

[33] Advisory Commission, *supra*, p. 11.

[34] Army Regulation 30-30, paragraph 2 (21 April 1966).

box and bank account, dealt with his stockbroker, stored his personal belongings, and attended to those personal affairs which he neglected while on the road. The Ninth Circuit in *James* denied the claimed §162(a)(2) deduction because the taxpayer there incurred no duplicated expenses. Since he had no substantial expenses at his purported "home," he incurred only one set of living expenses—when he was on the road. The court recognized that allowing a deduction in such circumstances would not effectuate the purpose of the travel expense provision of the Code but would, contrary to §262, give the taxpayer the unwarranted advantage of deducting his ordinary living expenses.

For the same reason a military officer should be denied a deduction for his meals. The military system of tax-free allowances, low cost meals, and free lodging eliminates any substantial duplication of expenses at his permanent post of duty. Thus his only unreimbursed expenses are those of his family, which any taxpayer is required to bear without a tax deduction as "personal, living, or family expenses." 1954 Code §262.

Indeed, until the instant decision, there was little room for doubt that a serviceman's permanent duty post was his home for purposes of §162, even though he was separated from his family. In *Bercaw* v. *Commissioner*, 165 F. 2d 521, the Fourth Circuit held that an officer whose permanent station was at Fort Meade, Maryland, could not deduct his meal and janitorial expenses as "traveling expenses * * * while away from home" although he was living away from his

family. Relying on the Commissioner's long-standing interpretation of home as well on the special allowance given a military officer, the court state (at 524):

> * * * whenever [the serviceman] * * * made a permanent change of station that place of duty becomes his place of business and there is his "home". * * *. Thus the expenditures for meals and striker service while at this post were personal living expenses and nondeductible. * * *.

The Commissioner has reiterated this position in Rev. Rul. 55-571, 1955-2 Cum. Bull. 44, which states that:

> * * * members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling "away from home" and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them.[25]

Respondent received the same tax-free subsistence allowance with which to purchase his food that all

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[25] When a serviceman is temporarily away from his permanent duty post he is permitted to deduct his living expenses. Therefore, a naval officer may deduct his meals while aboard ship at sea but not while at his home base. Rev. Rul. 55-571, *supra*. Civilians who were called up for temporary military service during the "Berlin crisis" were permitted to deduct the costs of meals and lodging in excess of their quarters and subsistence allowance because their military assignment was expected to be of temporary duration. Rev. Rul.

military officers received. While the Army provides meals at a price almost exactly equal to the military subsistence allowance, the prices at a Marine officers' mess vary from post to post, according to the quantity and quality of the food selected by the particular mess in question.[26] Thus, while respondent received $42 per month tax-free subsistence allowance,[27] his mess bills were $65 per month. But the fact that the charge for meals at the Iwakuni mess was higher than the regular subsistence allowance received by respondent was not attributable to the fact that he was stationed overseas. It was the result of the happenstance that the particular mess at which he was eating undertook to provide a higher quality and greater variety of food than was obtainable for the regular charge. The higher charge might have been similarly incurred at a mess in El Toro, California, or a lower charge might have been applicable at another post in Japan to which respondent might have been assigned. Thus, the fact that respondent's allowance

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63–64, 1963–1 Cum. Bull. 30; see also Rev. Rul. 60–189, 1960–1 Cum. Bull. 60. Apparently this latter ruling was in recognition of the fact that "citizen" soldiers would probably bear additional costs of maintaining their civilian homes when they were called up on temporary military duty. Of course, these rulings do not justify a deduction for respondent since the Tax Court found his assignment was not temporary. See also Rev. Rul. 60–189, 1960–1 Cum. Bull. 60.

[26] Meal prices at Marine Officers' Messes are set by each mess to cover the net cost of food sold. Marine Corps Manual, Paragraph 4010 (20 July 1966).

[27] See *supra*, p. 3, n. 3.

did not cover the full cost of his meals in Japan [28] does not justify a departure from the long standing rule that a soldier's permanent post of duty is his "home" for purposes of § 162."

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[28] To the extent that the subsistence allowance is inadequate to meet an officer's food costs, this appears to be a matter for Congress to correct by increasing subsistence allowances to all officers rather than by giving relief to a limited group through the tax laws. The last increase in the subsistence allowance was in 1952 when it was increased 14 percent. Act of May 19, 1952, c. 310, 66 Stat. 80. The Military Pay Act of 1963 as passed by the House contained a provision increasing the subsistence allowance by 6.6 percent. H.R. 5555, 88th Cong., 1st Sess., Sec. 9. This provision was deleted by the Senate at the request of the Department of Defense, which was studying the whole system of subsistence allowances. 109 Cong. Record, Part 11, p. 14205. The Eighty-ninth Congress took no action on H.R. 1026, a bill to increase the subsistence allowance to $75 per month.

[29] In addition to providing for the serviceman's direct living expenses for food and lodging when he is away from his family, Congress has made special provision for his dependents when military service forces family separation. Even though the serviceman is away, he continues to receive, as we have pointed out above, a tax-free allowance for his family's lodging. 37 U.S.C. 403. Recognizing that the family may reduce its expenses by living with relatives, the government will also pay the transportation and moving expenses of the serviceman's family to any point in the United States. 37 U.S.C. 406; Joint Travel Regulations, Ch. 7. Finally, since 1963 Congress has provided for a monthly allowance of $30 per month when a serviceman is separated from his family for more than 30 days. 37 U.S.C. 427, because it recognized that the absence of the head of the family may cause extra household expenses. H. Rep. No. 208, 88th Cong., 1st Sess., p. 28.

If, moreover, the Commissioner's interpretation of § 162(a)(2) is not accepted, the result will be a wholly unwarranted tax windfall for a particular group of military officers. An officer's subsistence allowance, which is intended to reimburse him for the cost of his meals, is also excluded from his gross income and is thus tax exempt. Regulations on Income Tax (1954 Code) § 1.61-2(b); Mim. 3413, V-I Cum. Bull. 29 (1926); *Jones* v. *United States*, 60 Ct. Cl. 552. On the other hand, when a civilian travels for his employer and receives an expense allowance to reimburse him for his expenses of meals and lodging, the amount of the reimbursement is included in his income. Rev. Rul. 190, 1953-2 Cum. Bull. 303; *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8); *Courtney* v. *Commissioner*, 32 T.C. 334. In order to make the reimbursement tax free, the businessman is allowed to deduct his traveling expenses for meals and lodging to offset the taxable reimbursement. Since the military officer's subsistence allowance is already excluded from his income, to permit him also to deduct the expenses that the tax-exempt allowance was intended to offset would give him a windfall. Cf. 1954 Code § 265. For example, if a military officer *who is living with his family* on or near his duty post earns $6,000 salary and receives a $575 tax-free subsistence allowance which he spends on meals, his taxable income will be $6,000. If the same military officer is assigned to a permanent duty station *to which he cannot take his family* and he receives, in addition to his $6,000 salary, the same $575 tax-free meal allowance which he spends on food, his taxable income should also be

$6,000. But if the Commissioner's position is rejected in this case, the latter's taxable income would be only $5,425 ($6,000 less a $575 deduction for meals "while away from home * * * [on] business").

In summary, we submit that the Commissioner's consistent position over 45 years that a taxpayer's principal place of business or employment is his "home" within the meaning of § 162(a)(2) has been incorporated into law by repeated congressional reenactment of the travel expense statute. As we have demonstrated (*supra*, p. 11), Congress was aware of the Commissioner's position, which has been accepted by the Tax Court since 1927 and by the great majority of the courts of appeals. This rule is particularly appropriate where the taxpayer is a military officer stationed at a permanent duty post.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

HOWE A. STIDGER, *ET UX.*,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

JOHN A. REED
Amicus Curiae In Support of
the Judgment Below

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 173

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

HOWE A. STIDGER, *Et ux.*,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

Preliminary Statement

On November 7, 1966, this Court entered an order inviting John A. Reed "to brief and argue this case, as *amicus curiae,* in support of the judgment below."

No exception is taken to the presentation in the Brief for the Petitioner (at pp. 1-2 thereof) of the material required by Items (a) and (b) of Rule 40 of the Rules of this Court.

Question Presented

This case involves the question whether a Captain in the United States Marines who was on a regular tour of duty of 15 months in the Far East, and whose family was prohibited from accompanying him, may deduct from his gross income amounts expended for meals in 1958 at officers' messes in the Far East.

Statutes Involved

Internal Revenue Code of 1954 (26 U. S. C.):

"SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and Business Deductions.*— . . .

(2) *Trade and business deductions of employees.* — . . .

(D) *Outside Salesmen.*—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer."

"SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;"

* * * * * *

"For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

* * * * * *

"SEC. 212. EXPENSES FOR PRODUCTION OF INCOME.

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year—

(1) for the production or collection of income;"

* * * * * *

"SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

Statement of the Case

1. The Facts

Respondent* was during 1957 and 1958 a Captain in the United States Marine Corps. For approximately two and one-half years preceding October, 1957, he had been attached to a Marine Air Squadron stationed at El Toro, California. During this period he lived with his family

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* Mrs. Stidger is a party solely because a joint return was filed for 1958.

(his wife and two children) in nearby Santa Ana, California (R. 51).

On October 1, 1957, respondent, together with his squadron, commenced a standard tour of duty in the Far East with the First Marine Aircraft Wing, a part of Aircraft Fleet Marine Force, Pacific, with administrative headquarters at Marine Corps Air Station, El Toro, California (R. 15, 37, 51). On that date, he departed from El Toro, California, for Iwakuni, Japan (R. 51). Dependents of Marine Air personnel were prohibited by Marine Corps orders from accompanying such personnel or establishing homes in the Far East (R. 15-16, 26, 51). Such a prohibition was rare at that time in the Marines and in the other branches of the armed services (R. 38, 39). During respondent's tour of duty abroad, his wife and two children (aged one and eights years in October, 1957) continued to reside in Santa Ana, California (R. 39, 51).

Respondent's standard tour of duty was originally expected to last for 14 months, but in 1958 the standard tour of duty, for a commissioned officer in his circumstances, was changed to 15 months by a revised Directive relating to regular overseas tours of duty issued by the U. S. Marine Corps (R. 24-31, 48).

Respondent's itinerary from October, 1957 to December, 1958 was as follows (R. 51, 52):

Date	Place	Approximate No. of Days
1 Oct 57 to 20 Feb 58	Departed MCAS El Toro, Calif., traveled to, and duty at Iwakuni, Japan	142
21 Feb 58 to 7 Mar 58	Cubi Point, Philippine Islands	14
8 Mar 58 to 19 Apr 58	Iwakuni, Japan	42
20 Apr 58 to 23 May 58	Naha AFB, Okinawa	33

Date	Place	Approximate No. of Days
24 May 58 to 10 Aug 58	Iwakuni, Japan	78
11 Aug 58 to 29 Aug 58	Yokosuka, Japan	18
30 Aug 58 to 1 Sep 58	Iwakuni, Japan	2
2 Sep 58 to 19 Sep 58	San Diego, Calif.	17
20 Sep 58 to 25 Sep 58	Iwakuni, Japan	5
26 Sep 58 to 10 Oct 58	Naha AFB, Okinawa	14
11 Oct 58 to 14 Dec 58	Iwakuni, Japan	64
15 Dec 58 to 19 Dec 58	Travel to MCAS El Toro, Calif.	4

During 1958 respondent received the same pay he had been receiving in California (R. 37).

Throughout the entire year 1958 respondent received his basic housing allowance (approximately $102.50 per month) and his basic subsistence allowance (approximately $42.50 per month), representing the same amounts he had been receiving in California in 1957 while residing with his family in the United States (R. 16, 36, 37, 41, 51, 52).

While he was at Iwakuni, respondent was furnished free quarters but was required to pay for his own meals which were available at the post's officers' mess for approximately $65 per month (R. 4, 52). Respondent testified that these represented "additional expenses I would not normally have" (R. 37).

During the calendar year 1958 respondent was placed in travel status for 49 days, and he was reimbursed for the cost of his meals on those days by means of a *per diem* allowance; he does not claim any deduction for meals on those days (R. 16, 37, 42).

Respondent is claiming a deduction of $650 from gross income for 1958, representing the cost of meals at messes for 10 months at $65 per month. He paid for his meals during the other 2 months at officers' messes at several other places in the Far East (R. 42, 50, 51, 52).

Assuming that his initial trip from California to Iwakuni took 4 days (as did his final return trip), he was at Iwakuni during 1957-1958 approximately 329 days, but not for any single period of more than 138 days (R. 51, 52).

In December, 1958, respondent completed his tour of duty in the Far East and was assigned to duty at the Marine Corps Air Station, Cherry Point, North Carolina, where he remained until he retired in July, 1962 (R. 62, 53).

On his 1958 income tax return respondent deducted the $650 he had spent for meals in the Far East, computed on the basis of $65 per month for 10 months. The Commissioner disallowed the deduction.

2. The Proceedings Below

The Tax Court found that respondent's stay at Iwakuni was "not temporary" and that during 1958 his "home" within the meaning of §162(a)(2) of the Internal Revenue Code of 1954 was his military post of duty in the Far East. Accordingly, the Tax Court decided that the expenses in question were not incurred while "traveling • • • away from home," characterising his stay there as "indefinite, indeterminate, or permanent" (R. 50-57).

The United States Court of Appeals for the Ninth Circuit, one judge dissenting, reversed the Tax Court and held that the deduction claimed was allowable. The Court below rested its decision on the grounds that "home," as used in the statute, means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable; that Captain Stidger during the taxable year 1958 was therefore away from "home"; and that the expenses claimed as a deduction by him were "ordinary and necessary." In conjunction with the foregoing analysis, the Court below commented that the words of the statute limiting deductions to "ordinary

and necessary'' expenses should prevent undesirable results in other cases from the application of its test.

The Court below concluded that, inasmuch as the statute allows the deduction of the *entire* amount expended for meals and lodging, it was unnecessary for the taxpayer to show that he would not have been obliged to pay an equal amount for meals at his home post in the United States.

Summary of Argument

This case involves the question whether a Captain in the United States Marines who was on a regular tour of duty of 15 months in the Far East, and whose family was prohibited from accompanying him, may deduct from his gross income amounts expended for meals in 1958 at officers' messes in the Far East. The Court below correctly held that respondent was entitled to deduct such amounts.

''Home'', as used in the statute, means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable. Thus, if it appears reasonable to have expected a taxpayer to move his family and permanent abode to his new station or closer to his new station, and thus avoid the double burden (maintaining his home abode and meeting the living expenses of his place of employment) that the statute intended to mitigate, then expenses claimed as travel expenses cannot be deducted.

The words of the statute limiting deductions to ''ordinary and necessary'' expenses should prevent undesirable results.

The affirmance by this Court of the decision of the Court below, even if rested on the same grounds relied on below, need not drastically affect the position of the Internal Revenue Service in this field nor change the result in any great number of cases.

Thus the Service's position seems to be that "home" as used in the statute, means, at least as a general rule, the taxpayer's principal place of employment, to which general rule the Service admits there are several exceptions.

In the alternative, even if the Service's general rule as to the meaning of "home" is to govern, it is submitted that the deduction here claimed should be allowed by this Court, either by carving out another exception to the Service's general rule, or by extending its "temporary" exception, its "construction worker" exception, or its "traveling salesman" exception to cover at least Captain Stidger's factual situation (where it was absolutely impossible for him to move his family to the locality in which he was working) and perhaps to cover other factual situations where (1) the taxpayer has a family living elsewhere (than where he works) and (2) at the time the taxpayer's employment at a new post of duty is begun, it is unreasonable (on the basis of an objective, not a subjective, standard) to expect him to move his family there.

There is nothing to indicate that Congress intended, or has approved, an interpretation of the statute such as to require the disallowance of a deduction of the type claimed in the case at bar. The legislative history of the statute is inconclusive as to whether Congress intended, or has accepted, the Internal Revenue Service's interpretation of "home." Nor have the Federal income tax regulations ever contained any provision defining "home" or throwing any light on the position of the Service with respect to a case such as this.

The Internal Revenue Service rulings, while not entirely consistent over the years, have taken the position for many years that "home" ordinarily refers to the taxpayer's principal place of business. Nevertheless, the

Service has often changed its position with respect to the application of the statute to various factual situations.

Even the Tax Court has concluded that the Service's "overnight" rule in this field makes no sense. But the "overnight" rule is not the only one of the Service's rules in this field which makes no sense.

The Service's rules with respect to servicemen, summarized in Appendix B hereto, at the very least result in inequalities. For example, a naval officer is permitted to deduct the entire cost of his meals on board ship when it is away from home port (whether he is single or has a family and whether or not he maintains a place of abode elsewhere). Thus the supposed reason for the deduction, the duplication in expense, is being ignored.

On the other hand, a serviceman is permitted to deduct no part of the cost of his meals (a) at his home port or base or (b) when stationed at one locality (in this country or overseas) for an indefinite period.

To be contrasted is the treatment of the traveling salesman who has no fixed place of business. He is apparently treated as being away from "home" only if he has a place of abode to which he can return at any time. Not only is this a recognition by the Service that "home" sometimes means a place of abode but it is also inconsistent with permitting a naval officer to deduct the cost of his meals on board ship whether or not he has a place of abode to which he can return at any time.

The fact that respondent was an officer in the Armed Services should not affect the result. The allowance of the deduction here claimed would not distort the basic purpose of the statute or give respondent and similarly situated servicemen advantages not available to other taxpayers.

Respondent received the same pay and basic allowances while in the Far East as he did while residing with his family in the United States. These basic allowances (for subsistence and quarters), which he continued to receive, are granted by law independently of whether the officer is required to travel and are entirely unrelated to expenses incurred in travel. No increase therein was received by him during the taxable year 1958 to help defray the increased expenses incurred by him while required to live away from his family.

Respondent was therefore worse off economically in the taxable year 1958 than he had been before he went to the Far East.

This was so, in spite of the fact that his basic allowance for subsistence continued to be tax-free.

Captain Stidger's expenses for meals in the Far East, at least to the extent that they represented increased expenses which he would not have had when living with his family, constituted ordinary and necessary expenses which should be deductible. They should be deductible, moreover, regardless of the period of his stay in the Far East. So long as it was impossible for him to take his family along, at the very least, these additional expenses for meals were ordinary and necessary expenses, regardless of the duration of his stay.

The allowance of the deduction here claimed should tend to improve the morale of servicemen and others similarly situated.

I

"Home" means residence but must be established as near the place of employment as is reasonable.

As the Court below held, "home," as used in the statute, means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable; thus, if it appears reasonable to have expected a taxpayer to move closer to his place of employment, then some or all of the expenses claimed as travel expenses should not be deductible. The words of the statute limiting deductions to "ordinary and necessary" expenses should prevent undesirable results.

(a) This Court Has Not Defined "Home".

This Court has not defined "home" as used in this statute.

In *Commissioner* v. *Flowers*, 326 U. S. 465 (1946), a lawyer who had long lived and practiced law in Jackson, Mississippi, was employed as the principal counsel of a railroad with its main office in Mobile, Alabama, on the understanding that he could continue to reside in Jackson but would pay his own traveling expenses between Jackson and Mobile and his living expenses at both places. The railroad for many years permitted the taxpayer to do his work at either Jackson or Mobile but provided him with an office only at Mobile, which the Court regarded as his principal post of business. Although it was clearly the result of his own choice that he did not perform nearly all of his work in Mobile, the taxpayer sought to deduct the cost of transportation for 73 trips from Jackson to Mobile and for meals and lodging while in Mobile during the years

in suit. Affirming the Tax Court's decision, the Supreme Court held for the Commissioner on the ground that the expenses in issue were not incurred "in pursuit of business" because the travel was required not by the railroad's business but solely by reason of the taxpayer's personal desire to maintain his residence in Jackson while his principal post of duty was in Mobile. As the Court observed, "Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." 326 U. S. 465, at 474. The majority opinion said that it was not passing upon the meaning of "home". The dissenting opinion (by Justice Rutledge) expressed the view (at p. 477) that "home" should be given its normal meaning.

In *Peurifoy* v. *Commissioner*, 358 U. S. 59 (1958), this Court considered the deductibility of expenses of construction workers for board and lodging while at a construction project in North Carolina. This Court did not reach any substantive question on the merits, holding only that the Court of Appeals had fairly assessed the record on the sole question presented by the parties as to whether the employments there involved were "temporary" as contrasted with "indefinite" or "indeterminate."

The dissenting opinion in the *Peurifoy* case (by Justice Douglas, with whom Justices Black and Whittaker concurred) expressed the view (at p. 62) that "home" was not synonymous with the situs of the employer's business; that, if construction workers do not take their families with them, they are living "away from home" for the duration of the term of the jobs. The dissenting opinion would have rejected the Service's test of whether the employment was "temporary" or "indefinite," on the ground that it

improperly emphasized duration of the absence as the determinative factor in deciding where the taxpayer's home is.

(b) The Legislative History of the 1921 Act was Inconclusive as to the Meaning of "Home".

The discussion in Petitioner's Brief (pp. 8-9) of the legislative history of the Revenue Act of 1921* appears substantially accurate, insofar as it goes. It is interesting to note, in addition, that two Senators, both members of the Senate Finance Committee but neither the Chairman, presented conflicting views of "home" in the debate on the floor of the Senate with respect to that Revenue Bill.

Thus Senator David Walsh of Massachusetts stated it to be his personal view that this provision would allow Congressmen to deduct their meals and lodging expenses while in Washington.**

Senator James Watson of Indiana replied that he had been advised "by those who are here representing the Treasury Department" that no such deduction would be allowable to members of Congress because (1) being a member of Congress was not engaging in a trade or business and (2) Washington was a Congressman's "home."***

It is not clear whether the Treasury Department at that time rested its view that Washington was a Congressman's "home" on the ground that (a) it was the place where he carried on most of his duties as a Congressman, or (b) it was the place where he and his family were living.

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* Section 214(a), Revenue Act of 1921.

** 61 Cong. Rec. 6673 (1921).

*** 61 Cong. Rec. 6673 (1921).

(c) The Position of the Internal Revenue Service as to the Meaning of "Home" has not been Entirely Consistent over the Years.

The Federal Income Tax Regulations have never contained any provision throwing any light on the position of the Service with respect to the meaning of "home."

Nor have the published rulings of the Service been entirely consistent, it is submitted, in stating that "home" ordinarily refers to the taxpayer's principal place of business. To be sure, as pointed out in the majority opinion of this Court in the *Flowers* case (at pp. 471-472), some rulings, of which some are cited in footnote 5 (326 U. S. 465, 472), have so held.

But some of the early rulings denied the deduction on grounds unrelated to the meaning of "home." It was held, for example, that a naval officer who was stationed in one locality "for an indefinite period of time" could not deduct under the Revenue Act of 1921 the cost of his meals and lodging because he was not "engaged in traveling in pursuit of a trade or business." I. T. 1404, I-2 Cum. Bull. 145 (1922). The ruling did not attempt to define "home."

In at least two early rulings, moreover, both promulgated in 1922, the Service said that the taxpayer was away from "home" while working if, and only if, he maintained a house or other living quarters to which he could always return. I. T. 1490 (single salesman who travels 365 days a year) and I. T. 1497 (naval officer on board ship).*

In 1941 the Service announced it was still following its 1922 ruling that a naval officer may deduct his expenses for meals on board ship if, and only if, he maintains a house or living quarters to which he can return at any time. I. T. 3474, 1941-1 Cum. Bull. 207.

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*Both reported at I-2 Cum. Bull. 89 (1922).

In 1955, the Service modified these 1922 and 1941 rulings with respect to naval officers, however, as more fully set forth under Point III below, "to the extent that they are inconsistent with the foregoing conclusions concerning the meaning of the term 'home.'" Revenue Ruling 55-571, 1955-2 Cum. Bull. 44.

Revenue Ruling 55-571 announced the surprising rule that members of the Armed Forces of the United States "on permanent duty assignments at official stations overseas," are not traveling "away from home" and may not deduct their expenses for meals and lodging at such locations, even though they are required to maintain homes in the United States for their families *who are not allowed to accompany them.* Rev. Rul. 55-571, 1955-2 Cum. Bull. 44.

Revenue Ruling 55-571 justified that position solely on the ground that recent court decisions had indicated that "home" was located at the place which constituted a taxpayer's principal or regular post of duty even though it was difficult or impossible for a taxpayer to maintain his family abode at his principal or regular place of business, citing only *Warren* v. *Commissioner,* 13 T. C. 205 (1949) *Jones* v. *Commissioner,* 13 T. C. 880 (1949).

But the authority of those cases has been seriously undermined by subsequent developments. In those cases the denial of the deduction claimed was rested upon the failure of the taxpayer to meet a supposed requirement that the expenses be necessary to the prosecution of his employer's business, relying upon *dictum* in the majority opinion of this Court in *Commissioner* v. *Flowers, supra.* Under that supposed requirement it was held, in the *Warren* and *Jones* cases, to be "irrelevant" that it was difficult or impossible for the taxpayer to move his family to the place where he was working.

In 1960 the Service announced that a taxpayer-employee has his own business to prosecute and, therefore, need not be furthering the interests of his employer to be eligible for this deduction. Revenue Ruling 60-189, 1960-1 Cum. Bull. 60, 65. Indeed, no such argument had been made by the Government in the *Peurifoy* case, as was pointed out in footnote 6 (at 358 U. S. 59, 63) of the dissenting opinion therein.

Thus, while the Service has not specifically repudiated Revenue Ruling 55-571, that ruling now rests on a shaky foundation, to the extent it holds it to be immaterial that it is impossible for a taxpayer to maintain his family abode at his principal place of business.

Revenue Ruling 55-571 is unique in that it represents the Service's only announcement that the fact that it is impossible for a taxpayer to move his family to the place where he is working is irrelevant; it is limited to one class of taxpayers—members of the Armed Forces "on permanent duty assignments at official stations overseas." Inasmuch as the Service has carved out other exceptions to its general rule as to the interpretation of "home," it is surprising that it has not carved out an additional exception covering the "impossible-to-move case." Certainly in such a situation the expenses are "ordinary and necessary."

Perhaps the other ruling that comes closest to dealing with the "impossible-to-move" case is Revenue Ruling 60-189, 1960-1 Cum. Bull. 60, relating to construction workers.

In the case of one who usually works in and around the city where he maintains his regular place of abode but at times is employed at distant points for various periods of time, it was held that he could deduct the cost of his meals

and lodging at or near the project sites, at least so long as his distant employment is not expected to extend nor does in fact extend for as long as one year at any one location. There was no limitation restricting the duration of the combined periods of absence while at several project sites; they might well aggregate more than one year. His "home" was said to be the vicinity in which he usually worked; his employment at the other locations was pronounced "temporary" and he was, therefore, found to be away from "home" when at the various projects.

The ruling went on to state that the Service has never attempted to prescribe any specific length of time as representing the usual line of demarcation between temporary and non-temporary periods but that "an employment or stay of *anticipated* or *actual* duration of a year or more at a particular location must be viewed by the Service as strongly tending to indicate presence there beyond a temporary period, and cases involving such an employment or stay will normally for that reason alone be subjected to close scrutiny." (Emphasis theirs; 1960-1 Cum. Bull. 60, 63:)

In the absence of some indication of a tax avoidance abuse, however, the Service "will normally raise no question concerning the temporary nature of an employment or stay at a particular location if both its anticipated and actual durations are for less than one year."* (1960-1 Cum. Bull. 60, 64).

The same ruling, Revenue Ruling 60-189, dealt also with the case [Case (2)] of a construction worker who does not regularly work in the locality where (a) he maintains his regular place of abode and (b) his employment contacts

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* In view of the fact that Captain Stidger was not at any one location in the Far East for as much as twelve months, the ruling comes close to giving him its blessing.

are maintained. His expenses for meals, lodging, etc., at the various construction projects were held deductible on the theory that his "home" was in the locality where he maintained his regular place of abode and where he had his employment contacts. It was assumed that he would not work more than twelve months at any one project. In justifying this conclusion, the ruling said (p. 67):

> "It would be quite another matter, and would *wrench the meaning of the word 'home' beyond the permissible bounds of statutory construction,* to read it as totally devoid of any commonly understood meaning and as comprehending no more and no less than one's principal or regular place of business or employment." (Italics supplied.)

Does not the position taken in Petitioner's Brief, however, "wrench the meaning of the word 'home' beyond the permissible bounds of statutory construction?"

Revenue Ruling 60-189 distinguished the case [Case (3)] of the itinerant construction worker who takes his family (if any) and his personal belongings with him from one construction job to another and has no actual residence elsewhere. The Service will continue to regard such a person as having his "home" for traveling expense purposes only at each successive place where he works.

The ruling admits that distinguishing between Case (2) and Case (3) in concrete cases "will present varied, and often difficult, questions of fact that can be resolved only in the light of all the facts and circumstances of the particular case"; it suggests that important considerations in doing so (p. 67) "are whether a claimed place of abode is the taxpayer's regular place of abode in a real and substantial sense and whether the facts as a whole tend to show that the undertaking of jobs away from the point where

business contacts are normally maintained is primarily for business rather than for personal reasons."

Petitioner's Brief contends, however (at p. 16), that the interpretation of "home" adopted by the Court below "would inevitably require the difficult case-by-case approach that the Commissioner's rule was designed to avoid." The implication seems to be that it is better to reach the wrong result in a case such as this rather than to force the Commissioner to assume "a great administrative burden." (Petitioner's Brief, p. 16).

But is has been shown above* that the Commissioner has voluntarily assumed such a burden in the case of construction workers. No reason suggests itself why he should be less willing to assume such a burden in the case of officers in the Armed Services.

Since 1954 the Internal Revenue Code has expressly provided for the allowance to "outside salesmen" of a deduction from gross income, in arriving at "adjusted gross income" of the deductions allowed by Code Section 162, quoted above. Code Section 62. For that purpose an "outside salesman" is defined as one whose trade or business is to solicit, away from his employer's place of business, business for his employer.

The Report of the Senate Finance Committee contains (at p. 10) the following general comment with respect to this provision of the Revenue Bill of 1954 (in addition to what is contained in the Detailed Discussion of the Technical Provisions of the Bill):

> "As in the case of the transportation expenses described above, business expenses of an 'outside salesman' who is an employee presently may be deducted in arriving at adjusted gross income only if they are reimbursed or incurred while he is away from home overnight.

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* See discussion of Revenue Ruling 60-189.

> If these salesmen were independent contractors they would be permitted to take business expense deductions in computing adjusted gross income and still use the standard deduction. Moreover, the business expenses incurred by outside salesmen usually are substantial relative to their incomes.
>
> Both the House and your committee's versions of this bill treat outside salesmen in effect like self-employed persons with respect to these expenses, permitting their deduction of expenses in arriving at adjusted gross income even though the salesmen use the standard deduction. *These deductions include expenditures for meals*, split commissions paid on subcontracts, etc. An 'outside salesman' is defined as an employee engaged principally in the solicitation of business for his employer at places other than the employer's place of business." (Italics supplied.)

It would appear from the provision just quoted that an "outside salesman" was to continue to be allowed a deduction for meals when on the road, both in computing "taxable income" or "net income", and in computing "adjusted gross income," at least if he was away from "home" overnight, even though he had no principal place of business; that his residence was to be treated as his "home."

As indicated above, an early ruling held that a salesman who was always traveling could deduct his expenses only if he had a place of abode to which he could return at any time. I.T. 1490, I-2 Cum. Bull. 89 (1922).

In view of the recent cases,* however, dealing with the right of a traveling salesman who has no principal place of business to deduct his expenses for meals and lodging

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* See, for example, *James* v. *U. S.*, 308 F. 2d 204 (9th Cir. 1962); *Hicks* v. *Commissioner*, 47 T. C. No. 7 (1966); *Deneke* v. *Commissioner*, 42 T. C. 981 (1964); *Scotten* v. *Commissioner*, 1966 T. C. M. 206 (1966).

unless he has living quarters to which he can return, it seems a fair inference that this is still a requirement of the Service; that I.T. 1490 is still being followed.

While Captain Stidger's income tax return for 1958 itemized deductions and while, therefore, the amount of his "adjusted gross income for 1958" is not here in issue, the legislative history of Code Section 62 is of interest in view of the cross-reference in Code Section 62 to the deductions allowable under Code Section 162.

The present position of the Service, in summary, seems to be that "home" ordinarily refers to the taxpayer's principal place of business, to which general rule the Service apparently admits there are at least the following exceptions: (1) the taxpayer is away from "home" if engaged in "temporary" employment away from (a) his principal place of business, (b) the place where he usually works, or (c) the place where his regular place of abode is located and his employment contacts are maintained;* and (2) a traveling salesman, having no fixed place of business, may deduct his expenses for meals** and lodging, at least if he maintains a house or other living quarters to which he may return at any time.***

In 1963 the Treasury Department recommended to the Congress a revision of the statutory provision here pertinent "to clarify existing law" as to the meaning of "away from home." Legislative proposals with respect to the 1963 Tax Bill were submitted to the Congress on February 6, 1963 by the Secretary of the Treasury. A technical Memorandum submitted by the Secretary at that time recommended an extensive revision of Code Section 162(a)(2), quoted above. The recommendation is set forth in full in the Appendix hereto.

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* Revenue Ruling 61-95, 1961-1 Cum. Bull. 479.

** If away overnight, at least.

*** I.T. 1490, I-2 Cum. Bull. 89 (1922).

Under those Treasury Department recommendations, it would appear that in a case such as Captain Stidger's the question would have become one of whether his absence from his "duty area" (his principal residence) was "temporary" in nature. He would probably have been denied a deduction for his meals in the Far East, at least under the literal wording of the recommendations, on the ground that he had been assigned to a new place of work (the Far East) and that his absence from his "duty area" (the place where his principal residence is located, assuming that he had no principal post) was not "temporary" in nature because he in fact remained at his new place of work for more than one year.

The Congress has not seen fit to take any legislative action as the result of such Treasury Department recommendations.

(d) Congress Should Not Be Deemed to Have Approved by Implication the Internal Revenue Service Definition of "Home".

Petitioner's Brief suggests (at pp. 8-11) that the Commissioner has defined "home" so consistently for so many years that his interpretation should be deemed to possess implied legislative approval.

It has been shown above, however, that the Commissioner's definition of "home" has been much less consistent over the years than Petitioner's Brief indicates. The Commissioner has adhered to his general rule (as to "home"), to be sure, for many years. The question has been as to the exceptions.

The rule that Congress would be deemed to have approved by implication a long-standing Internal Revenue

Service interpretation of the income tax statute arose in the days of the Revenue Acts when Congress re-enacted every two years or so every provision of the income tax statute.* Even in that setting it does not seem to have been applied consistently.**

In the present day era of Internal Revenue Codes (the 1939 and 1954 Codes being the only ones to date), in lieu of the Revenue Acts, there is much less reason for the rule. While it is true that Section 162 has been revised once since 1954 (by Section 4(b) of the 1962 Act), Congress was then focusing on the expense account abuse. See, for example, Report of the House Ways and Means Committee, pp. 19-26 with respect to the Revenue Bill of 1962.

One of this Court's most recent income tax opinions indicated that this "legislative re-enactment rule" of statutory interpretation does not apply to a long-standing interpretation by ruling, as differentiated from regulation. In *Commissioner* v. *Tellier*, 383 U. S. 687 (1966), this Court referred to the argument that the expenses under consideration there should be disallowed as a deduction on public policy grounds, stating (at pp. 690-691):

> "That view finds considerable support in other administrative and judicial decisions. It finds no support, however, in any regulation or statute or in any decision of this Court * * *."

Similarly where an administrative construction had been adhered to in the face of consistent rejection by Courts of Appeals and where there had been an inconsistency in the administrative interpretation of the statute

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* *Helvering* v. *Reynolds*, 306 U. S. 110 (1939); *Koshland* v. *Helvering*, 298 U. S. 441 (1936); *Morrissey* v. *Commissioner*, 296 U. S. 344 (1935); *Poe* v. *Seaborn*, 282 U. S. 101 (1930).

** Compare, for example, *Helvering* v. *Reynolds* and *Koshland* v. *Helvering*, *supra*.

(facts not unlike those in the case at hand), the National Labor Relations Board sought to have this Court follow the same course as that for which the Petitioner's Brief is asking here. The Court held:

> "With all this uncertainty surrounding the eventual authoritative interpretation of the existing law, the failure of Congress to enact a new law simply will not support the inference which the Board asks us to make."*

It is interesting to note that even the Tax Court** has finally refused to follow the Commissioner's long-standing "overnight" rule with respect to the deduction for meals under Section 162(a)(2). In *Bagley* v. *Commissioner*, 46 T. C. 176 (1966), the Tax Court, in failing to follow its many former decisions to the contrary said:

> "We have asked ourselves: In every situation does a strict application of the 'overnight' rule really make sense? And, secondly, *has Congress clearly given its approval* to an inflexible rule disallowing expenses incurred for meals on non-overnight trips? On reflection we believe both of these questions must be answered in the negative." (Italics supplied.)

(c) The Legislative History of the 1952 Amendment Does Not Show that Congress at that Time Accepted the Commissioner's Definition of "Home".

Petitioner's Brief refers (at p. 11) to the 1952 Congressional debates, with respect to a proposed amendment

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* *National Labor Relations Board* v. *Television Broadcast Engineers Union*, 364 U. S. 573, 585 (1961).

** Among the other courts that have refused to follow the "overnight" rule and thus have rejected any contention that Congress should be deemed to have approved by implication that long-standing position of the Service, are *Correll* v. *U. S.*, F. 2d (6th Cir.), decided November 29, 1966, opinion reported at 66-2 U. S. T. C. ¶ 9778; *Chandler* v. *Commissioner*, 226 F. 2d 467 (1st Cir. 1955); *Williams* v. *Patterson*, 286 F. 2d 333 (5th Cir. 1961); *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir. 1962).

to the Legislative Branch Appropriations Act to permit a Congressman a deduction for his living expenses in Washington, as showing that Congress at that time "apparently accepted the Commissioner's long-standing interpretation" of "home". Let us look at the record.

The stage for these 1952 debates had been set by the following factors:

(1) In 1934 the functions of a public office had been included by statute in the definition of a trade or business.* This seemed to leave "home" as the only ground for denying Congressmen meals and lodging expense deductions in Washington.

(2) In *Lindsay* v. *Commissioner of Internal Revenue*, 34 B. T. A. 840 (1936), the Board of Tax Appeals had denied to a Congressman a deduction for his meals and lodging while in Washington on the ground that he was not "away from home", reasoning that "home" meant his principal place of business, which was in Washington.

(3) In 1943 the Treasury had issued G. C. M. 23672, 1943 Cum. Bull. 66, allowing a deduction to a businessman for meals and lodging while in Washington as a "dollar-a-year man" rendering services to the Federal Government in connection with the war effort under a contract providing for the payment of a specific amount upon a *per diem* basis—if, and only if, he had not severed his connection with his private employer and continued to render active service to such private employer. It apparently continued to be the position of the Internal Revenue Serv-

*Section 48(d), 1934 Revenue Act, which has since been retained in the income tax statute. The Internal Revenue Service has stated that this legislation was declaratory of existing law; that military and civilian officers and employees of the Government have generally been regarded as engaged in a "trade or business," I.T. 4012, 1950 Cum. Bull. 33.

ice, however, that a Congressman could not deduct the cost of his meals and lodging in Washington.

(4) Finally, Congress in 1951 had abolished the tax-free expense allowance for its members (which had been in existence for some time). Revenue Act of 1951, Section 619(d).

The final form of the amendment, as enacted (Act of July 9, 1952, c. 598, 66 Stat. 464, Public Law 471, 82nd Cong., 2nd Sess.) provides that the place of residence of a member of Congress shall be considered to be his "home"* for purposes of the income tax deduction for traveling expenses, but that amounts expended by such member for living expenses shall not be deductible in excess of $3,000.

The $3,000 ceiling was agreed upon by the Conference Committee; the House had passed an amendment imposing no ceiling on the amount deductible but the Senate had stricken the amendment entirely.

According to Congressman John McCormack of Massachusetts, the then majority floor leader and the proponent of this bill in the House, its purpose was to place Congressmen on a par with other taxpayers.

The Congressman said concerning "home":

> "Tax administrators and judges have had difficulty in arriving at a definition of the term 'home'

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* A letter dated March 20, 1953, from the Internal Revenue Service to Congressman Daniel Reed, Chairman of the House Ways and Means Committee, held that the $3,000 maximum only applies to Washington expenses and not to additional traveling expenses outside of Washington which a member of Congress might incur. The latter is summarized at ¶L-5707 of Vol. 3 of the Research Institute of America Tax Coordinator.

and in applying the statutory language to specific cases.'"*

Later in his explanation of the problem involved, Congressman McCormack referred to the *Lindsay* case, *supra*, which held that the principal place of business was "home", and said:

> "On this reasoning—which is judicial legislation if I have ever seen it—the expenses of a Member of Congress while attending a session of Congress were held not to be deductible * * *."*

The thrust of Mr. McCormack's statements was that a Congressman should receive the same tax treatment as any other person; and if he must maintain two homes because of his business, then he should be entitled to deduct expenses as would any other taxpayer.**

To Senator Walter F. George,*** however, the problem of whether a Congressman is in a trade or business in Washington was still a subject of dispute in 1952. When the bill reached the Senate, Senator George stated his position in very certain terms. As to the proposed amendment, Senator George said that it simply classified Congressmen as businessmen.****

Senator George commented with respect to an Internal Revenue Service ruling that a member of Congress has two homes, one where he lives and one in Washington:

> "That is one of the unaccountable rulings the Treasury sometimes makes. Of course, it is nonsense, * * * as are so many of their decisions. I do not defend the Treasury at all, but they could have

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* 98 Cong. Rec. 5280 (1952).

** 98 Cong. Rec. 5281 (1952). In 1953, in an unsuccessful attempt to remove the $3,000 ceiling, Mr. McCormack presented the same purpose and reason for the amendment. 99 Cong. Rec. 7003 (1953).

*** The then Chairman of the Senate Finance Committee. The bill had been reported out to the Senate by the Senate Appropriations Committee.

**** 98 Cong. Rec. 8277 (1952).

placed their decision upon a sound basis—namely that a public official is not conducting a private business for gain.'"*

These are not the comments of someone accepting the Service's position on "home."

Relatively few other Senators commented on the floor of the Senate, other than by their vote on the amendment, with respect to the Service's interpretation of "home". Prominent among the defenders of the Service was Senator Harry Byrd of Virginia.**

It is submitted that the legislative history of the 1952 amendment does not show that Congress accepted the Commissioner's then interpretation of "home."

(f) The Decisions of the Lower Courts—the Bercaw Case.

In general, the discussion in Petitioner's Brief of the decisions of the lower courts is substantially correct, except as indicated herein.

Its discussion of the *Bercaw**** case, the only case relied on in the Petition for Certiorari as being in conflict with the decision below, is a striking exception; that case is readily distinguishable from the case at bar.

Bercaw was called up as a reserve Army officer on August 20, 1941 and thereafter was stationed at Fort Meade, Maryland, at least as long as December 31, 1941. His family (his wife and child) lived during that period at their farm near Wilmington, Virginia, some 160 miles from Fort Meade. The Government furnished no quarters at Fort Meade to house his wife and child. It was held that Bercaw could not deduct the cost of his meals at the Army mess at Fort Meade.

It is submitted that the *Bercaw* case did not involve an impossible-to-move situation at all.

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* 98 Cong. Rec. 8277 (1952).

** 98 Cong. Rec. 8281-8282 (1952).

*** 165 F. 2d 521 (4th Cir. 1948).

II

The fact that respondent was an officer in the armed services should not change the result.

The instant facts are basically similar to facts that might arise in the case of civilians. Thus Captain Stidger was transferred to a foreign area for a fixed period, was told that he could not take his family with him, that he would be moving around a good deal within a particular area of the world, the Far East, and that he must be prepared to make such a move on little or no notice.

The only differences of conceivable relevance between the instant facts and those likely to arise in the case of a civilian were (1) that Captain Stidger continued to receive from his employer certain allowances for meals and lodging, in the same amounts which he had received back home, (2) those allowances continued to be exempt from income tax and (3) his only additional expenses while abroad, over those which he would have incurred while in the United States, were the cost of his meals, which he obtained at a relatively low cost, lower than the cost of the average civilian.

Petitioner's Brief relies (at p. 21 *et seq.*) on the system of allowances and benefits for a serviceman, in contending that the deduction claimed should be disallowed because Captain Stidger was in the Armed Services.

Respondent received the same pay and basic allowances while in the Far East as he did while residing with his family in the United States. No increase therein was received by him during the taxable year 1958 to help defray the increased expenses presumably incurred by him while required to live away from his family.

These basic allowances (for subsistence and quarters) which respondent continued to receive are granted by statute* independently of whether the officer is required to travel, or is in travel status and are entirely unrelated to expenses incurred in travel. Revenue Ruling 55-572, 1955-2 Cum. Bull. 45, 46.

While the basic allowance for subsistence may have been fixed by Congress at an amount believed to be roughly equal to the then cost of meals in an officers' mess,** such basic allowance is not considered by the Internal Revenue Service, in the case of an officer who travels, as reimbursement for additional expenses incurred by reason of travel. Revenue Ruling 55-572, 1955-2 Cum. Bull. 45, 46.

The Internal Revenue Service rulings with respect to the income tax consequences of the basic allowances to a serviceman for meals and subsistence (which allowances have been long treated as tax-free***) have not been consistent in their approach.

Initially the Internal Revenue Service ruled under the Revenue Act of 1921, that a naval officer who was stationed in one locality "for an indefinite period of time" may not deduct the cost of his meals and lodging because he is not "engaged in traveling in pursuit of a trade or business." I. T. 1404, I-2 Cum. Bull. 145 (1922).

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* 37 U. S. C. 402, 403.

** The last increase in such basic allowance was in 1952. Act of May 19, 1952, c. 310, 66 Stat. 80. The Hook Commission stated (see Petitioner's Brief, pages 23, 24) that the appropriate guide for determining the amount of such allowance is the amount equivalent to defray the cost to the individual of the officers' mess (page 11 of Hook Commission Report; Government's Brief, page 24). While the Hook Commission recommended an increase in the subsistence allowance, Congress has not yet acted on the matter.

*** Regs. §1.61-2(b); T. D. 3274, IV-2 Cum. Bull. 136 (1925); I. T. 3597, 1943 Cum. Bull. 69; I. T. 3456, 1941-1 Cum. Bull. 193; I. T. 3420, 1940-2 Cum. Bull. 40; I. T. 2219, IV-2 Cum. Bull. 41 (1925); *Jones* v. *U. S.*, 60 Ct. Cl. 552.

At about the same time the Service ruled under the 1921 Act that a naval officer "on permanent duty afloat" may deduct amounts expended by him for subsistence while aboard ship, "notwithstanding the duration of such service" if, and only if, he maintains a home elsewhere. I. T. 1497, I-2 Cum. Bull. 89 (1922).

On reconsideration, that ruling (I. T. 1497) was "modified" nineteen years later to hold that a naval officer "on permanent duty afloat" (not a travel status) and who maintains a home elsewhere may deduct only that portion of the amount expended by him for meals on board ship as exceeds his money allowance for subsistence. I. T. 3474, 1941-1 Cum. Bull. 207 (1941). If he does not maintain a home elsewhere, he is entitled to no deduction under either the 1922 or 1941 rulings.

In 1955 the Internal Revenue Service, in two rulings promulgated simultaneously, modified both the 1922 and 1941 rulings. It first announced a rule that members of the Armed Forces of the United States on permanent duty assignments at official stations overseas are not traveling "away from home" and may not deduct their expenses for meals and lodgings at such locations, even though they are required to maintain homes in the United States for their families who are not allowed to accompany them. Rev. Rul. 55-571, 1955-2 Cum. Bull. 44.

This rule was to apply to a naval officer while at the home port of his ship, inasmuch as he was then at his principal or regular post of duty. That ruling went on to say that a naval officer could deduct the cost of his meals while on board ship, inasmuch as he would then be considered to be in travel status for tax purposes.

Revenue Ruling 55-571 closed with the statement that the aforementioned 1922 and 1941 rulings "are modified

to the extent that they are inconsistent with the foregoing conclusions concerning the meaning of the term 'home.'"

The companion 1955 ruling decreed that *per diem* allowances received by officers of the uniformed services of the United States traveling on official business away from their designated post of duty were includible in their gross income; that expenses for meals, etc., incurred by them while in such travel status, assuming that they were otherwise deductible, were deductible in full without the necessity of offsetting against such expenses the amount of basic subsistence allowances received. Revenue Ruling 55-572, 1955-2 Cum. Bull. 45. That ruling went on to say that the 1941 ruling referred to above (I. T. 3474) "is modified to the extent it requires a naval officer on permanent duty afloat to offset his (basic) subsistence allowance against any expenses incurred for subsistence while aboard ship before taking deductions therefore."

Thus at the end of 1955 the position of the Service seemed to be that a naval officer could deduct the entire cost of his meals on board ship or away from his home port or base, but no part of the cost of his meals (a) at his home port or base, or (b) when stationed in one locality (in this country or overseas) for an indefinite period.

That this is the present position of the Service is made clear in the excerpts, reproduced in Appendix B hereto, from the 1966 Edition (for 1965 tax returns) of "Federal Income Tax Information for Service Personnel," a pamphlet distributed by the Department of the Navy and approved by the Internal Revenue Service.

In 1963 the Internal Revenue Service issued Revenue Ruling 63-64, 1963-1 Cum. Bull. 30. As indicated in the Brief for Petitioner (at pp. 26 and 27 thereof), the ruling dealt with reservists called to active duty by reason of

the Berlin crisis and concluded that such a reservist was performing temporary duty with the Armed Forces.*

A person falling into this category might be entitled to deduct part of the cost of his meals while on active duty, so the ruling held, provided that (1) he had a principal or regular place of business or employment to which he would return after his period of service and (2) he was stationed away from the general area where his civilian place of employment or other business was located. The ruling went on to say, however, that only the excess of his expenses for meals over his basic subsistence allowance could be deducted,** asserting that the remainder of the expenses were allocable to the receipt of exempt income (the basic subsistence allowance), with the result that a deduction therefor was prohibited by Section 265 of the Internal Revenue Code.

Revenue Ruling 63-64 distinguished Revenue Ruling 55-572 as having dealt with expenses incurred while away from the permanent military post of duty, whereas Revenue Ruling 63-64 dealt with expenses incurred while at the principal military post of duty.

The case at bar is, of course, distinguishable from the facts of Revenue Ruling 63-64, in that Captain Stidger would have continued to receive a tax-free basic allowance for

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* The ruling pointed out (1) that Public Law 87-117 provided that the President of the United States might call certain members of the Ready Reserve to active duty for not more than 12 consecutive months and (2) that in fact virtually all of the reservists who were summoned to active duty pursuant to Public Law 87-117 were actually released in less than a year. The ruling concluded that such reservists did not, at the time they were ordered to active duty, expect to remain in active duty status for a full year.

** Revenue Ruling 63-64 is still being followed by the Service with respect to other reservists temporarily called to active duty. See Item 26(b)(4) of the pamphlet distributed by the Department of the Navy and reproduced in Appendix B hereto.

subsistence in any event, whether stationed in the United States or abroad. The reservist considered in Revenue Ruling 63-64, on the other hand, had not been receiving any such allowance prior to his call to active duty. For that reason it would be much more difficult to maintain that expenses incurred for meals were allocable to the receipt of exempt income in the case of Captain Stidger than in the case of the reservists considered in Revenue Ruling 63-64.

For that reason, and for the further reason that the statute (Section 162) allows the deduction of the *entire* amount expended for meals, it is submitted that the Court below correctly held that the entire amount expended by Captain Stidger for meals in the Far East was deductible.

Assuming that Captain Stidger could have eaten at home with his family at a lower cost than the cost of his meals in the Far East, as the Court below believed (R. 70), he was worse off economically while in the Far East in 1958 than he had been in California in 1957; this is true whether or not he is subject to income tax on his basic allowances.

The allowance of the income tax deduction here claimed would alleviate that situation; that should have a salutary effect upon the morale of servicemen similarly situated.

III

In the alternative, even if the Service's general rule as to "home" is to stand, an exception thereto should cover this case.

In the alternative, even if the Service's general rule as to the meaning of "home" is to govern, it is submitted that the deduction here claimed should be allowed by this Court, either by carving out another exception to the Service's general rule or by extending its "temporary" exception,

its "construction worker" exception or its "traveling salesman" exception to cover Captain Stidger's factual situation and other factual situations where (1) the taxpayer has a family living elsewhere (than where he works) and (2) at the time the taxpayer's employment at a new post of duty is begun, it is unreasonable (on the basis of an objective, not a subjective, standard) to expect him to move his family there.

As pointed out above, even the Tax Court has concluded that the Service's "overnight" rule in this field makes no sense. But the "overnight" rule is not the only one of the Service's rules in this field which makes no sense.

The Service's rules with respect to servicemen, summarized in Appendix B hereto, at the very least result in inequities. For example, a naval officer is permitted to deduct the entire cost of his meals on board ship when it is away from home port (whether he is single or has a family and whether or not he maintains a place of abode elsewhere). Thus the supposed reason for the deduction, the duplication in expense, is being ignored.

On the other hand, a serviceman is permitted to deduct no part of the cost of his meals (a) at his home port or base or (b) when stationed at one locality (in this country or overseas) for an indefinite period.

To be contrasted is the treatment of the traveling salesman who has no fixed place of business. He is apparently treated as being away from "home" only if he has a place of abode to which he can return at any time. Not only is this a recognition by the Service that "home" sometimes means a place of abode but it is also inconsistent with permitting a naval officer to deduct the cost of his meals on board ship whether or not he has a place of abode to which he can return at any time.

Captain Stidger's expenses for meals in the Far East, at least to the extent that they represented increased expenses which he would not have had when living with his family, constituted ordinary and necessary expenses which should be deductible. They should be deductible, moreover, regardless of the period of his stay in the Far East. So long as it was impossible for him to take his family along, at the very least, these additional expenses for meals were ordinary and necessary expenses, regardless of the duration of his stay.

Conclusion.

The judgment of the Court below should be affirmed.

Respectfully submitted,

JOHN A. REED
Amicus Curiae In Support of
the Judgment Below

ROBERT LATHROP
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December, 1966

APPENDIX A

The Treasury Department's Technical Memorandum, submitted in connection with the Hearings before the Committee on Ways and Means, House of Representatives, February 6, 1963, stated (at pp. 98-99 of Part I of the Hearings):

"B. TRAVEL EXPENSES

1. General Statement of Recommendation

Under section 162(a)(2) of the Internal Revenue Code, a taxpayer is allowed to deduct traveling expenses while 'away from home' in the pursuit of a trade or business. Since the code at present does not define precisely what is meant by 'away from home,' it has been necessary for the Internal Revenue Service to promulgate rather extensive administrative interpretations. While the Service's interpretations have generally been sustained in litigation, some courts have adopted contrary rules, so that there is now a lack of certainty and of uniformity regarding some aspects of the travel expense area. It is recommended that additional statutory rules be provided to clarify existing law.

2. Redefinition of 'Home'

One of the problems under existing law is the definition of a taxpayer's 'home.' The Internal Revenue Service has defined 'home' as a taxpayer's principal place of business. Although this definition is proper as a matter of statutory interpretation, it is at variance with the commonly accepted meaning of the term 'home.'

The word 'home' would be replaced by the term 'duty area.' The taxpayer's duty area would be defined as a circular area of 20-mile radius with the taxpayer's principal business post as its center. A taxpayer's principal business post would be the place at which he reasonably

anticipates that, during the future course of his present employment, he will principally work or report for work (i.e., the place where he reasonably believes he will work or report for work more than any other place and at least one-third of his working days.) If a taxpayer did not have a principal business post within this definition, then his duty area would be centered around his principal residence. Any taxpayer who did not have a principal business post or a principal residence would be classified as an itinerant.

3. Deductibility of Food and Lodging Expenses

The Service has taken the position under existing law that a taxpayer must be 'away' from home at least overnight in order to be entitled to deduct food and lodging expenses. The proposal would refine and adopt the Service's position, incorporating therein the new definition of a taxpayer's duty area. Food and lodging expenses would be deductible by taxpayers who were temporarily away from their duty areas for periods of at least 16 hours, or a shorter time if they could prove that substantial rest was required on such trip. Itinerants would not be entitled to any food or lodging expense deductions, since they would not have a duty area.

This proposal would not apply to items such as business meals, which would be deductible otherwise, for example, as entertainment expenses.

4. Deductibility of Travel Expenses Other Than Food and Lodging

Aside from food and lodging, travel expenses incurred in pursuit of the taxpayer's trade or business would be fully deductible except for commuting expenses. Thus transportation costs incurred in pursuit of trade or business within or without a taxpayer's duty area once he has reported for work would continue to be deductible. Those transportation expenses incurred in traveling between a taxpayer's residence and any place in his duty area, however, would be commuting expenses and hence nondeduc-

tible. In the case of a taxpayer whose duty area was determined with reference to his principal business post, any travel between his residence and principal business post would constitute commuting expenses no matter how great the distance. In the case of a taxpayer whose duty area was determined with reference to his principal residence, any travel between the residence and any point within a 20-mile radius would be considered commuting. In the case of an itinerant, there would be no transportation costs disallowable on the grounds they were commuting expenses.

5. Definition of Temporary Absences

In case of an assignment to a new place of work, a taxpayer would be entitled to deduct travel expenses only if his absence from his duty area was temporary in nature. A taxpayer would be considered temporarily away from his duty area unless he: (1) moved his principal residence to the new location at which he was working; (2) could reasonably foresee that he would remain at his new place of work for at least 1 year; or (3) did, in fact, remain at the new place of work for 1 year.

6. Manner of Computing Deduction

As under present law, all travel expenses which met the tests for deductibility would be deductible in computing adjusted gross income (i.e., allowable whether or not the standard deduction were elected). Substantiation of deductions would be required in the same general manner as in the case of entertainment expenses. Reimbursed travel expenses would not be subject to withholding.

7. Effective Date

This proposal would be effective for taxable years beginning after December 31, 1963."

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APPENDIX B

The 1966 edition (for 1965 returns) of "Federal Income Tax Information for Service Personnel", a pamphlet prepared and distributed by the Department of the Navy and reviewed "by the Internal Revenue Service which has approved the text of this pamphlet as an authoritative source document," states:

"26. *Deductions from gross income.*—The following items are deductible from gross income in arriving at adjusted gross income:

(a) Travel expenses incurred while a ship or squadron is away from home port or base.—

(1) *Mess bills afloat.*—The amount paid by a member of the Navy on duty afloat may be deducted for the period that his ship is away from its home port, providing the voyage is of substantially longer duration than an ordinary day's work and during which his duties require him to obtain necessary sleep while away from such home port. The principle of this ruling applies equally to air squadron personnel when away from the squadron's home base and to Army personnel when on field duty or maneuvers. The deduction need not be offset by basic subsistence allowances. The mess bills afloat deduction does not apply to mess bills paid at a member's permanent station ashore.

(b) Other travel expense.—

* * * * * *

(2) On temporary or temporary additional duty, expenses, such as those incurred for meals, lodging, taxicabs, laundry and cleaning, in excess of reimbursements are deductible. * * *

(3) Travel expense, including meals and lodging, of Reserve personnel who, under competent orders,

with or without compensation, are required to remain away from their principal place of business overnight in the performance of authorized drills and training duty is deductible.

(4) A reservist temporarily called to active duty may deduct meals and lodging while on active duty if he (a) retained his regular job, (b) returned to it after release, and (c) was stationed away from the general area of that job or business. Such expenses are deductible only if the reservist pays for his meals and lodging at his official military post and only to the extent they exceed BAQ* and BAS*.

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40. *Miscellaneous items — not deductible.* — The following items are not deductible from adjusted gross income:

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(b) Living expenses of personnel stationed in one locality or overseas for an indefinite period."

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* *Note:* The reference undoubtedly is to the basic allowance for quarters and to the basic allowance for subsistence.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 173

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HOWE A. STIDGER, ET UX.

REPLY BRIEF

In his brief the amicus argues that the Commissioner's interpretation of § 162(a)(2) has not always been consistent. Specifically, he suggests that Rev. Rul. 55–571, 1955–2 Cum. Bull. 44, which permits a naval officer to deduct as travelling expense the costs of meals aboard ship when it is away from its home port, is inconsistent with the longstanding administrative interpretation of home as a taxpayer's principal place of employment.

However, in treating the naval officer's home port as his principal place of business, Rev. Rul. 55–571 is entirely consistent with this interpretation of home in § 162(a)(2). The ruling is based upon the premise that a naval officer is in a position similar to the engineer of a train, a bus driver, or an air-

243-233—67

plane pilot. Since the principal place of business for such taxpayers is their home terminal, and they are permitted travelling expense deductions when away on business trips, the revenue ruling permits a similar deduction when a naval officer is on a ship away from its home port or terminal. While, viewed in this light, the ruling on naval officers is thus consistent with the Commissioner's long-standing interpretation of the statute, the Commissioner now recognizes that it may be unrealistic to regard all naval officers assigned to permanent shipboard duty as analogous to engineers of trains, bus drivers or airline pilots and, as indicated in the attached letter, he "will reconsider the factual correctness of the underlying premise of that portion of Rev. Rul. 55-571 [relating to naval officers]."

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

U.S. TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Washington, D.C. 20224, January 9, 1967.

In re *Stidger, et ux., Howe A.*

Honorable MITCHELL ROGOVIN,
Assistant Attorney General, Tax Division,
Department of Justice, Washington, D.C. 20530

DEAR MR. ROGOVIN: In response to your inquiry, this is to advise you that we are prepared to reconsider that portion of Rev. Rul. 55–571, C.B. 1955–2, 44, which holds, in effect, that a naval officer on permanent duty afloat has his "home" for traveling expense purposes at the home port of his ship, rather than aboard the moving vessel. Our reconsideration is based upon the recognition that the factual situations involving naval officers assigned to permanent duty afloat may vary widely.

The portion of Rev. Rul. 55–571 here in question was based upon the premise that the home port of the ship of a naval officer on permanent duty afloat is comparable to the home terminals or ports of train and airplane crews, of longline bus and truck drivers, and of commercial fishermen, which are the "home" of such taxpayers for traveling expense purposes. Rev. Rul. 54–497, C.B. 1954–2, 75, 77; Rev. Rul. 55–236, C.B. 1955–1, 274; Rev. Rul. 55–235, C.B. 1955–1, 274. In the light of our recent discussions, however, we recognize that it may be unrealistic to

regard this premise as being universally appropriate as to all naval officers assigned to permanent duty afloat. Therefore, we will reconsider the factual correctness of the underlying premise of that portion of Rev. Rul. 55–571.

Very truly yours,

(Signed) Lester R. Uretz,
(Typed) LESTER R. URETZ,
Chief Counsel, Internal Revenue Service.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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SUPREME COURT OF THE UNITED STATES

No. 173.—October Term, 1966.

Commissioner of Internal Revenue, Petitioner, v. Howe A. Stidger et ux. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 20, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

In this case we are required to determine whether, under the 1954 Internal Revenue Code, expenditures for meals by a military officer stationed at a post to which his dependents were prohibited from accompanying him were deductible "traveling expenses . . . (incurred) while away from home" within the meaning of § 162 (a)(2)[1] or whether instead they were nondeductible "personal, living, or family expenses" within the meaning of § 262.[2] At all pertinent times, respondent [3] was a captain in the United States Marine Corps, attached to an aviation squadron. Immediately prior to October 1957, his per-

[1] "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ." § 162 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a)(2).

[2] "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." § 262 of the Internal Revenue Code of 1954, 26 U. S. C. § 262.

[3] Since a joint income tax return was filed by Captain and Mrs. Stidger, both are respondents here. In this opinion, however, the terms "respondent" and "taxpayer" refer only to Captain Stidger.

manent duty station was a Marine Corps base located at El Toro, California, and he lived nearby with his wife and children. On October 1, 1957, however, respondent and his squadron were transferred to Iwakuni, Japan, where they were to be based while serving a standard 15-month tour of duty in the Far East. Because dependents were prohibited from accompanying Marine Corps personnel to that duty station, respondent's wife and children remained in California.

Of the 14½ months' actual duration of respondent's Far Eastern tour of duty, he was physically located at the Iwakuni base for 10 months. The remaining time was consumed by travel and short periods of duty at various other military bases; respondent was declared to be in a "travel status" for a period of 49 days, and he received additional compensation for those days on a per diem basis. During the entire period of his service as a Marine Corps captain, both while he served at bases in the United States and while he served abroad away from his family, respondent also received tax-free monthly allowances for quarters and subsistence.

On his 1958 income tax return, respondent claimed a deduction of $650, representing the cost of his meals at a rate of $65 per month for the 10 months spent at the Iwakuni base. The Commissioner of Internal Revenue disallowed the deduction, ruling that the expenditure for meals was a "personal, living" expense under § 262 and not a travel expense under § 162 (a)(2). In the Commissioner's view respondent's "home" during the period in question was his permanent duty station at Iwakuni rather than California where his family resided; therefore, he was not "away from home" when he incurred the expenditure. The Tax Court upheld the Commissioner (40 T. C. 896), and respondent petitioned for review in the Court of Appeals for the Ninth Circuit. That court, in a *per curiam* decision with one judge

dissenting, reversed the Tax Court and rejected the Commissioner's definition of "home" for purposes of the deduction. 355 F. 2d 294. The majority of the Court of Appeals ruled that the word "home" as used in § 162 (a)(2) of the Code must be given its usual meaning as the place of residence, not the place of business, of the taxpayer and his family. And since it was not reasonable for this taxpayer to move his family residence closer to his place of business, the "ordinary and necessary" requirement applicable to all § 162 deductions was met and the cost of meals at Iwakuni was deductible. To resolve a direct conflict between this decision and a 1948 decision of the Court of Appeals for the Fourth Circuit in another case involving a military officer, *Bercaw* v. *Commissioner*, 165 F. 2d 521 (C. A. 4th Cir. 1948), we granted certiorari. — U. S. —.

This case then requires us to focus upon one of the three conditions which must be met before an item is deductible as a travel expense under § 162 (a)(2). There is no question but that the expenditure here was "ordinary and necessary" and that there was a "direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer." Cf. *Peurifoy* v. *Commissioner*, 358 U. S. 59 (1958); *Commissioner* v. *Flowers*, 326 U. S. 465 (1946). The essence of the case is whether respondent was "away from home" when he incurred the expenditure. And the answer to that question turns upon a determination of whether, under the circumstances related above, respondent's "home" in 1958 was his permanent duty station at Iwakuni, Japan, or, instead, the residence of his family in California.

From the Revenue Act of 1921 down to § 162 (a)(2) of the 1954 Internal Revenue Code Congress has pro-

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[illegible] Act of 1921, c. 136, § 214 (a), 42 Stat. 239,

vided a deduction from taxable income for travel expenses, including amounts expended for meals and lodging, while "away from home." Although Congress has not defined the crucial phrase "away from home," administrative rulings and regulations have been directed toward that problem. In 1921, a general rule was established to the effect that "home" meant the taxpayer's principal place of business or employment whether or not it coincided with his place of residence.[5] This interpretation prevented deductions of day-to-day commuting expenses which were not the unusual type of "traveling expense" to which the statute was directed. Cf. *Commissioner* v. *Flowers*, 326 U. S. 465, 470 (1926). Its logic has been applied to a host of other situations. Although certain refinements have been added,[6] the essential position of the Commissioner has remained unchanged.

While the court below,[7] together with the Fifth [8] and Sixth [9] Circuit Courts of Appeals, has not always agreed with this interpretation, the Tax Court [10] and all of the

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[5] O. D. 864, 4 Cum. Bull. 211 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921).

[6] See, *e. g.*, I. T. 1490, I-2 Cum. Bull. 89 (1922); Rev. Rul. 60-189, 1960-1 Cum. Bull. 60. See also note 22, *infra*.

[7] In addition to the instant case, see also *Wright* v. *Hartsell*, 305 F. 2d 221 (C. A. 9th Cir. 1962).

[8] *Steinhort* v. *Commissioner*, 335 F. 2d 496 (C. A. 5th Cir. 1964); *United States* v. *LeBlanc*, 278 F. 2d 571 (C. A. 5th Cir. 1960).

[9] *Burns* v. *Gray*, 287 F. 2d 698 (C. A. 6th Cir. 1961).

[10] See, *e. g.*, *Friedman* v. *Commissioner*, 37 T. C. 539 (1961); *Carroll* v. *Commissioner*, 20 T. C. 382 (1953). The facts of the *Carroll* case are closely analogous to the circumstances surrounding the claimed deduction here. The taxpayer there was an employee of the War Department who in 1947 was transferred to a "permanent duty station" in Korea for a minimum of one year. His wife and child remained in the United States. A deduction for the cost of meals and lodging while in Korea was not allowed by the Tax Court which noted that the taxpayer's employer (1) designated

other circuit courts of appeals which have considered it have sustained the Commissioner.[11] The Commissioner's interpretation of the word "home" in connection with travel-expense deductions was also made clear to Congress when in 1936 it was held that Members of Congress could not deduct expenses which they incurred in Washington, D. C., even though they also maintained a residence in the district from which they had been elected. *Lindsay* v. *Commissioner*, 34 B. T. A. 840. Congress did not respond to this ruling by amending the statutory language generally to provide that "home" was intended to be synonymous with "residence," but instead merely carved out an exception to cover the special travel expense problems inherent in service as a national legislator.[12]

The Commissioner argues that the fact that Congress has reviewed and re-enacted the pertinent language with an awareness of the administrative interpretation constitutes a legislative endorsement of the Commissioner's

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Korea as a "permanent duty station" and (2) granted per diem travel allowances only while the taxpayer was en route to and from Korea, not while he was based there. See also *Todd* v. *Commissioner*, 10 T. C. 655 (1948).

[11] See, *e. g.*, *O'Toole* v. *Commissioner*, 243 F. 2d 302 (C. A. 2d Cir. 1957); *Coerver* v. *Commissioner*, 297 F. 2d 837 (C. A. 3d Cir. 1962), affirming 36 T. C. 252 (1961); *Bercaw* v. *Commissioner*, 165 F. 2d 521 (C. A. 4th Cir. 1948); *England* v. *United States*, 345 F. 2d 414 (C. A. 7th Cir. 1965); *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C. A. 8th Cir. 1963); and *York* v. *Commissioner*, 160 F. 2d 385 (C. A. D. C. Cir. 1947). The Courts of Appeals for the First and Tenth Circuits apparently have not taken a position on this question.

[12] In 1952, the following sentence was added to § 162 (a) of the Code: "For purposes of the preceding sentence, the place of residence of a Member of Congress . . . within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000." 26 U. S. C. § 162 (a).

position and is sufficient reason for reversing the judgment below. *Helvering* v. *Winmill*, 305 U. S. 79 (1938). But it is not necessary for us to decide here whether this congressional action (or inaction) constitutes approval and adoption of the Commissioner's interpretation of "home" in all of its myriad applications since, in the context of the military taxpayer, the Commissioner's position has a firmer foundation. The Commissioner has long held that a military taxpayer's permanent duty station is also his home for purposes of determining deductibility of travel expenses. This position builds on the terminology employed by the military services to categorize various assignments and tours of duty, and also on the language and policy of the statutory provisions prescribing travel and transportation allowances for military personnel. For example, a Marine Corps directive, which was effective during respondent's Far Eastern tour of duty, defined the length of standard tours of duty in terms of the commencement and termination dates of "*permanent* change[s] of station."[12] Similarly, eligibility for certain statutory travel allowances turns upon whether an assignment constitutes a "change of *permanent* station" or whether the serviceman is "away from his designated post of duty." 37 U. S. C. § 404 (a)(1). Thus, the Commissioner's position recognizes, as do the relevant statutes and the military services themselves, that the "permanence" of location in civilian life cannot find a complete parallel in military life which necessarily contemplates relatively frequent changes of location.

The nondeductibility of expenses incurred by a military taxpayer while at a permanent duty station was previously challenged in *Bercaw* v. *Commissioner*, 165 F. 2d

[12] Marine Corps Order 1300.8B, c. 1, issued July 1, 1958. Record, p. 24.

521 (C. A. 4th Cir. 1948). There, the taxpayer, a reserve army officer who was called to active duty and assigned to Fort Meade in Maryland where there were no quarters for dependents, sought to deduct expenditures for his meals and janitorial service as costs of traveling "away from home" in pursuit of his trade or business. The Court of Appeals affirmed the Tax Court's disallowance of the deduction, stating:

> "The taxpayer was engaged in the business of an Army officer. His place of business was his particular Army post. If his Army duties required him to travel, he would have received a per diem allowance which would not have been taxable. . . . But whenever he made a permanent change of station that place of duty became his place of business and there was his 'home' within the meaning of Section 23 (a)(1)(A). . . . Thus the expenditures for meals . . . while at this post were personal living expenses and non-deductible. . . ."

Since the *Bercaw* decision, the Commissioner has reiterated his position in Rev. Rul. 55-571, 1955 Cum. Bull. 44. And until the decision of the court below in the present case, neither the courts nor Congress had disturbed the Commissioner's interpretation of "home" as it pertained to military personnel.

Additional support for the Commissioner's position is found in the fact that Congress traditionally has provided a special system of tax-free allowances for military personnel.[14] These allowances now range from monthly payments for quarters[15] and subsistence[16] to per diem payments when the serviceman is declared in a "travel

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[14] See generally Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces, Appendix 13-18 (1948).

[15] 37 U. S. C. § 403.

[16] 37 U. S. C. § 402.

status."[17] Provision may also be made for financial relief to assist dependents in relocating when they are prohibited from accompanying a serviceman on a change of permanent duty station.[18] In the present case, respondent received the per diem payments while he was away from his permanent duty station. His quarters at Iwakuni were provided without cost to him, and at the same time he continued to receive a tax-free quarters allowance of $102.50 per month;[19] he also received a tax-free subsistence allowance of $42.50 per month at all relevant times. Moreover, because his assignment to Iwakuni was a change of permanent station, his wife and children could have moved their residence to another part of the United States at the Government's expense; however, they elected not to exercise that option.

Underlying the system of special allowances is congressional recognition of the fact that military life poses unusual financial problems.[20] The system is designed to

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[17] 37 U. S. C. § 404. See also 37 U. S. C. §§ 405–412.

[18] 37 U. S. C. § 405 (h).

[19] 37 U. S. C. § 403 (d) provides: "A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if, because of orders of competent authority, his dependents are prevented from occupying those quarters."

[20] In 1948, the Hook Commission, which had been appointed by the Secretary of Defense to study military compensation, issued its report and recommendations. Advisory Commission on Service Pay, Career Compensation for the Uniformed Forces (1948). That report formed a principal basis for the Career Compensation Act of 1949, c. 681, 63 Stat. 802. On the subjects of subsistence and quarters allowances, the Commission stated (Appendix, p. 17):

"The theory behind the subsistence allowance is that since the officer is required to arrange and provide his subsistence at all times and since he has no choice as to the place where he is to be stationed and therefore does not have the choice of the average citizen as to the place and manner of subsisting himself, it is necessary to provide

provide complete and direct relief from such problems as opposed to the incomplete and indirect relief which an income tax deduction affords to a civilian business traveler.[21] If the system of allowances is in fact inadequate, or if there are inconsistencies in the Commissioner's application of the travel-expense provision to military personnel,[22] it is the province of Congress and the

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him with an allowance at all times so that he may bear that expense wherever stationed.

"Because an officer is transferred frequently from place to place and is required to dig up his roots at the old station and transplant them to the new station, the Government has acknowledged for years its obligation to furnish quarters to the officer for occupancy by himself and his dependents."

[21] Congress has through the years evidenced a determination to maintain the various allowances at levels consistent with the necessary financial burdens borne by servicemen. See, *e. g.*, *id.*, at 35 and Appendix 13–18; H. R. Rep. No. 779, 81st Cong., 1st Sess., p. 19. In 1963, Congress enacted yet another measure designed to provide direct relief to dependents separated from servicemen on permanent duty outside this country or in Alaska. 37 U. S. C. § 427 (b). Under specified conditions, this provision authorizes an allowance of $30 monthly. It was established because Congress recognized that separated families incur additional expenses. See H. R. Rep. No. 208, 88th Cong., 1st Sess., p. 29. That recognition is, of course, the same one that underlies the travel-expense deduction for civilian taxpayers.

[22] The Commissioner has taken the position that a naval officer may deduct as a traveling expense the cost of his meals aboard ship while the ship is away from its home port. Rev. Rul. 55–571, 1955–2 Cum. Bull. 44. Respondent contends that his own situation at Iwakuni was directly analogous to that of a naval officer on a ship at sea for an extended period of time. The Commissioner justifies the discrepant treatment by arguing that a naval officer should be treated like the engineer of a train, a bus driver, or an airplane pilot for purposes of the travel-expense deduction; the principal place of business of such taxpayers is their home terminal and they are allowed the deduction when away from that terminal on business.

Commissioner, not the courts, to make the appropriate adjustments. Given the Commissioner's long-standing and judicially approved interpretation, the knowledge of that interpretation by Congress, and the fact that Congress has chosen to deal specially by tax-free allowances with the financial problems peculiar to military life, we must agree with the Commissioner that the military taxpayer is not "away from home" when he is at his permanent duty station whether or not it is feasible or even permissible for his family to reside with him there. The judgment is, therefore,

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 173.—October Term, 1966.

Commissioner of Internal Revenue, Petitioner, v. Howe A. Stidger et ux. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 20, 1967.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Fortas concur, dissenting.

The resolution of this case depends upon whether respondent was "away from home" when he incurred the expenses.[1] The term "home" is not defined.

The Treasury's administrative rulings for many years have indeed treated the statutory word "home" as meaning a taxpayer's principal place of business or employment. See *Commissioner* v. *Flowers*, 326 U. S. 465, 471–472. To me it is clear that home means residence, with the qualification that a taxpayer should establish his residence as near to his place of employment as is reasonable. *Ibid.* Here the taxpayer was forbidden by military orders to take his family with him. He was, in other words, barred from taking his home with him whenever he went on military orders. The Commissioner points to the difficulty of having any rule other than the fixed one that "home" means the taxpayer's principal place of business or employment. It is said that if the rule

[1] Section 162 of the Internal Revenue Code of 1954 provides in relevant part:

"(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . . .

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

is not rigid, a great complex of facts would have to be considered: adequacy of housing at the new post, expense of moving, school facilities, health of the family, the need to care for elderly or ailing relatives, and the like. Only a fixed rule provides certainty, it is said; any other would threaten the desire for uniformity.

While equity is seldom an ingredient of the tax laws, while they are indeed inherently discriminatory in many ways, reflecting perquisites obtained by pressure groups,[2] we need not increase their harshness by giving simple words unusual or strained meanings—unless of course Congress has plainly made an arbitrary choice.

If the taxpayer chooses to maintain his residence at a place far removed from his place of business, the travel expenses are not "ordinary and necessary" since not dictated by business needs. *Commissioner* v. *Flowers, supra.* On the other hand, if the taxpayer cannot reasonably maintain his residence at his place of business, the travel expenses are "ordinary and necessary" and hence deductible. Such an interpretation would give effect to the congressional policy of allowing a deduction for expenses dictated by the needs of the taxpayer's employment.

In this case there can be no question that the expenses were incurred in the pursuit of the taxpayer's employment and that respondent could not move his residence to Iwakuni. There can be no question that the expenses were motivated by "the exigencies of business rather than the personal conveniences and necessities of the" re-

[2] ". . . assume that a farmer has a herd of hogs. Each year he selects certain young to be bred. After each sow has one litter, she is turned out to be conditioned for slaughter. The profits on the sale of the pigs unbred are taxable as ordinary income. But the profits on the sale of the pigs bred once are taxable as capital gains. They have been held as business properties producing other pigs. The fact that all the pigs are equally destined to be sold and eaten is unimportant." Eisenstein, The Ideologies of Taxation 174 (1961).

spondent. *Commissioner* v. *Flowers, supra,* at 474. I cannot see how the result is changed simply because respondent is a member of the armed services. The fact that Congress has afforded members of the military special allowances is no indication that Congress intended that they not be allowed to deduct "ordinary and necessary" expenses incurred while away from their residence. Respondent received the same pay and basic allowances while in the Far East as he did while residing with his family in the United States. There was no increase to help defray the increased expenses incurred by him while required to live away from his family.